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Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 219.

THE WESTERN PACIFIC RAILROAD COMPANY
AND CHARLES McLAUGHLIN

vs.

THE UNITED STATES.

BRIEF

OF HENRY BEARD,
Attorney for Appellants.

JUDD & DETWEILER, Printers.

Supreme Court of the United States.

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No. 219.

THE WESTERN PACIFIC RAILROAD COMPANY AND CHARLES McLAUGHLIN

vs.

THE UNITED STATES.

STATEMENT OF THE CASE.

This cause comes into this Court by appeal of the defendants below, from the decree rendered by the circuit court of the United States for the district of California, on the 20th day of June, 1878, in equity cause No. 1733, against them and in favor of the United States. (Decree on page 8 of printed Record. Appeal allowed, 196, and filed in this Court May 1, 1880.)

The bill of complaint was filed February 21, 1877, by the United States district attorney. *No direction or authority from the United States Attorney General* for the institution of the suit is set out in the pleadings.

I quote the most trenchant paragraphs in the complaint, as follows, (pp. 2, 3, 4):

To the honorable the judge of the circuit court of the United States for the ninth circuit, district of California.

John M. Coghlan, United States attorney in the district of California, on behalf of the United States of America,

brings this his bill of complaint against the Western Pacific Railroad Company, an incorporation organized within and under the laws of the State of California, and Charles McLaughlin, a resident of this district; therefore your orator complains, and says:

That by the several acts of Congress of the United States, approved July 1st, 1862, and amended July 2d, 1864, and March 3d, 1865, and by the joint resolution of 2d March, 1866, certain lands to be thereafter selected were to be granted to the said Western Pacific Railroad Company, provided said incorporation should complete a certain railroad and telegraph line in said several acts mentioned and described, and within the time and in the manner therein specified and set out, excluding and excepting from such grant all mineral lands embraced within the boundaries of said grant. That afterwards, to wit, on the 1st day of February, A. D. 1870, the commissioners, appointed for such purpose, filed with the Secretary of the Interior, at his office in the city of Washington, in the District of Columbia, United States of America, an official statement, representing therein that the said line of railroad and telegraph had been completed and equipped in the manner provided in the said several acts of Congress relative to the Western Pacific Railroad of California. That the said Western Pacific Railroad Company by its agent, Charles McLaughlin, on the 24th day of March, A. D. 1870, made and filed with the register and receiver of public lands, subject to sale at San Francisco, California, its original selection of lands within the proper circuits, (districts,) as provided in the said several acts of Congress. That among the lands so selected by the said Western Pacific Railroad Company was embraced the northeast quarter of section twenty-nine, in township one north, of range one east of Mount Diablo meridian, in the county of Contra Costa, in the State of California, containing one hundred and sixty acres of land. That thereafter said selection of lands were received at said land office, and was allowed by the register and receiver of the said land district of San Francisco, and return of said selections was there duly made by the said register and receiver to the General Land Office, at Washington, District of Columbia. That thereafter, to wit, on or about the 31st day of May, A. D. 1870, *United States letters patent in due form of law were issued to the said Western Pacific Railroad Company*, for the

said northeast quarter of section twenty-nine, in township No. one north, of range one east Mount Diablo meridian, and delivered to the said Western Pacific Railroad Company and came into the possession of the said Western Pacific Railroad Company.

And your orator further shows that the said parcel of land herein described and embraced in said letters patent granted, and hereinbefore described, was at the time the said Western Pacific Railroad Company selected the same, and applied for a patent for the same, and prior thereto, and ever since have been and now are mineral lands of the United States, containing *valuable quicksilver and cinnabar* deposits. That for more than ten years last past the said lands have been settled upon and occupied by persons engaged in mining in and upon the said land. That the mineral character of said lands has been well known during all the time it has been settled upon and occupied.

And your orator further shows that the map of the public survey of said lands was filed by the surveyor-general of the United States, in the office of the register and receiver for the district of San Francisco, on the 17th day of October, A. D. 1873, and that on said official map said lands are located as mineral lands.

Your orator further shows that by the terms of said letters patent all mineral lands are specially excepted and excluded from the operations of said letters patent.

Your orator further shows that the allowance of said selection by the said register and receiver and the return thereof to the General Land Office at Washington, District of Columbia, and the issue of said United States letters patent, and all the acts pertaining thereto and connected therewith, were done and performed unadvisedly and through inadvertence and mistake. * * *

And your orator further shows that the said Charles McLaughlin, at the time the said United States letters patent was transferred to him as aforesaid, then and there well knew and had notice that the land described in the said patent hereinbefore described was mineral lands of the United States occupied as aforesaid; that they were wholly unfit for cultivation and agricultural purposes, and were not and never had been subject to be granted under the provisions of the several acts of Congress, and that the said letters

patent had been unlawfully obtained by the Western Pacific Railroad Company, as aforesaid.

And your orator charges that by reason of the premises said United States letters patent, are illegal, fraudulent, and void; that they have and cast a cloud upon the title of the United States to said lands, and embarrass and obstruct the free and clear alienation of the same to bona fide purchasers.

And your orator prays that the same be adjudged and decreed to be null and void and wholly vacated, annulled, and set aside and cancelled and held for naught, and for such other and further relief as to your honor shall seem meet in the premises. * * *

To this bill McLaughlin filed his answer. He admitted the issuing of the patent as stated, and that he is now the owner of the land described in the bill, but denied that the said tract was ever mineral land. He also denied that the said tract was know as mineral land; denied that it had been occupied as mineral land, as alleged in the bill; denied the validity of the pretended surveys of said tract in 1873; denied that by the terms of the patent all mineral lands are exempted from the effect of the patent; and denied that the selection of the land "was allowed by the register and receiver" "through inadvertence or mistake;" and denied that "the issuing of the patent, or any of the acts pertaining thereto, was done or performed unadvisedly or through inadvertence or mistake."

He denied that he knew or had notice when he purchased the said quarter section, that the land was mineral land, and denied that the patent had been unlawfully obtained by the railroad company, and denied that the United States has any title whatever to the tract described, (p. 5.)

The United States filed replication to the answer, (p. 7.)

In the bill of complaint (p. 3) it is alleged that the quarter section in contest at the date of selection, and before and since, have been and are mineral lands, containing "*valuable quicksilver* and cinnabar deposits."

The replication (p. 7) also alleges that the "said land

contained *valuable deposits of quicksilver* rock in place, as well as cinnabar in surface earth."

The complaint alleges that the official map of the survey of the tract locates this as mineral land, and is dated in October, 1873. McLaughlin having answered that the tract had been surveyed long prior to the patent, and that the survey of 1873 was made long after the official survey, (record, p. 5,) the replication (p. 7) reiterates the allegation that there was no legal survey of said land until about the year 1873.

There are other allegations and denials. I have selected those that appear to present the controversy squarely as it stands to-day.

The court below entered the following decree, (p. 8):

At a stated term of the circuit court of the United States of America for the district of California, held at the court-room, in the city of San Franciso, on Thursday, the twentieth day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the honorable Lorenzo Sawyer, circuit judge.

THE UNITED STATES *vs.* THE WESTERN PACIFIC RAILROAD COMPANY, and Charles McLaughlin.	In equity. No. 1733.

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz: That the land described in the bill of complaint filed herein, and being part of the land mentioned in the letters patent issued on or about the 31st day of May, A. D. 1870, by the United States to the defendant, the said Western Pacific Railroad Company, the title to which land was afterwards, by several mesne conveyances, vested in the said defendant, Charles McLaughlin, being that certain tract of land described as follows, to wit: The northeast quarter of section twenty-nine, in township number one, north of range number one east, of Mount Diablo base and meri-

dian, in the county of Contra Costa, California, containing one hundred and sixty acres of land, were mineral lands within the meaning of the acts of Congress referred to in the bill of complaint, and not subject to entry by said Western Pacific Railroad Company, and said letters patent, which are fully described in the bill herein now on file in this cause, were issued by mistake and without authority of law as to the lands in the bill of complaint and in this decree described, and that said letters patent as to said land herein mentioned, and only as to said land be adjudged and decreed to be null and void, and that the same be to that extent set aside, cancelled, and held for naught, and that the grantee and all others deriving title to said land hereinbefore described under said letters patent take nothing by reason thereof.

And it is further ordered, adjudged, and decreed that the defendants pay to the complainant, the United States, his costs in this suit as taxed, amounting to the sum of three hundred and twenty-three dollars and seventy cents.

(Signed) LORENZO SAWYER,
Circuit Judge.

The very distinguished judge who rendered the decree has filed no opinion in the case.

It was provided by stipulation that the patent issued by the United States to the defendant railroad company, 31st May, 1870, might be filed in evidence, Record, p. 11, also p. 179, but we do not find any copy thereof in the record.

It is admitted that a certificate in the following form is issued by the register and receiver upon the admission of selections of railroad lands, (p. 178,) by the Western Pacific Railroad Company.

UNITED STATES LAND OFFICE, 18—.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the under selection by , the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is

allowed and approved, and that the whole of said lands are *surveyed public lands of the United States*, and within the limit of miles on each side; and that the same are not, nor is *any part thereof, returned and denominated as mineral land or lands*, nor claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to as allowed by the act of Congress, approved July 1st, 1864, and contemplated by the circular of instructions, dated January 24th, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices; and that the said company have paid to the undersigned, the receiver, the full sum of , in full payment and discharge of said fees.

Register.
Receiver.

As the letters-patent are stated in the bill to have been issued "in due form" of law, it is thereby conceded that the customary forms were observed by the local officers, the General Land Office, and the Secretary of the Interior, in issuing said patent, which, as stated in the petition, is dated 31 May, 1870.

The circular of the General Land Office under which the tract now in controversy was selected is believed to have been that of Jan. 24th, 1867.

(2d Lester's Land Laws, Regulations and Decisions, p. 362.)

I call attention to the 8th and 9th paragraphs of these instructions, as follows, pp. 363, 364:

"8th. Herewith is a form of title-page to be prefixed to the Lists of Selection.

"Let me here call your special attention to the necessity of *great care* in the examination and testing of these lists, so that all conflicts may be avoided and improper selections be excluded, and that the verified schedules may be absolutely accurate, thus avoiding embarrassment and delay to all concerned.

"9th. Pacific Railroad act, July 2, 1864.—It is provided in

section 4 that the word 'mineral,' when it occurs in that act, shall not be held to include iron and coal. Therefore, iron and coal lands are subject to selection by the Pacific railroads; but all other minerals are expressly excluded from the grant, and must necessarily be so from all selections you may certify to this office. When the verified lists are received at the General Land Office, prepared and certified as above required, such definitive action as the law requires will be here taken, with a view to invest the grantee with a complete title." * * *

It is conceded by the appellants that "all mineral lands" are excepted from this operation of the grant under which the patent issued to the defendant railroad company, but the term "mineral lands" must "not be construed to include coal and iron land." (Sec. 3, act July 1, 1862, 12 Stat., 492; and Sec. 4, act July 2, 1864, 13 Stat., 358.) But they claim that the proper officers of the United States had made the intelligent decision that the said land was subject to the said grant, and that it was not mineral land, before and at the time that the said patent was issued.

The testimony was taken at San Francisco before an examiner in chancery. Seventeen witnesses were examined on behalf of the United States, (Record, p. 12,) beginning June 27, 1877. Two of the witnesses for the Government were recalled; and seven additional witnesses sworn for the defence, p. 115. In the testimony much that is relevant is repetition, and intermingled with much unimportant and some difficult to interpret.

The land is worth $6000. Record p. 196

ASSIGNMENT OF ERRORS IN THE DECREE OF THE U. S. CIRCUIT COURT.

1. The appellant, McLaughlin, excepts to the finding and judgment of the said circuit court—because it does not appear in the pleadings or decree that the United States, by its Attorney General, authorized the filing of the bill in this cause.

2. The appellant, McLaughlin, excepts to the finding of the court that the 160 acres of land in the bill described were "mineral lands" within the meaning of the acts of Congress mentioned in said complaint, and claims that the evidence before the court was and is insufficient to sustain the conclusion.

3. The said appellant excepts to the finding that the patent to the defendant railroad company therefor was issued by mistake and without authority of law.

In support of the first exception above, I respectfully refer to the case of the United States *vs.* Throckmorton, 98 U. S. Repts., p. 61, from which the subjoined quotation is made, remarking here that there is not found any such important principles or valuable property at stake in this case, as I would suppose would be requisite to induce the United States to have recourse to the courts to set aside its own conveyance.

On page 70 of 98 U. S. Repts., I find the following:

"We are of opinion that, unless by virtue of an act of Congress, no one but the Attorney-General, or some one authorized to use his name, can bring a suit to set aside a patent issued by the United States, or a judgment rendered in its courts on which such a patent is founded.

"That is the case before us, and we see nothing in the bill to indicate to the court that it ever received the sanction of the Attorney-General, or was brought by his direction. The allegation already cited implies that Mr. Van Dyke, the district attorney, is the complainant; but if, construing it liberally, we hold that the United States is the complainant, the statement is clear that the bill was brought by the district attorney, and not by the Attorney-General. Leaving out of consideration all mere questions of form, there arises no presumption from the act of Congress which gives the Department of Justice a general supervision over the district attorneys, that this suit was brought by his direction; for they, in the strict line of their duty, bring innumerable suits, indictments, and prosecutions, in which

the United States is plaintiff, without consulting him. In the class of cases to which this belongs, however, the practice of the English and the American courts has been to require the name of the Attorney-General as indorsing the suit before it will be entertained. The reason of this is obvious; namely, that in so important a matter as impeaching the grants of the government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit. He should, also, have control of it in every stage, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill."

Remarks relative to statutory provisions and definitions of the "mineral lands."

The case at bar appears to the undersigned to be one of much interest and importance. It involves the question "What are "mineral lands"—what is the meaning and interpretation of those two words, "mineral lands," as found in the United States land laws?

The lands in controversy are alleged by the pleader in the petition to be "mineral lands," because "containing valuable quicksilver and cinnabar deposits," Record, p. 3; and in the replication he says, "said land contained valuable deposit of quicksilver in rock in place, as well as cinnabar in surface earth."

We accept this as correctly defining mineral lands. The deposits of the precious metal must be *valuable*, and here there is but one standard of value practicable. Mineral lands must contain ores sufficiently rich in quality, and affluent in quantity, to yield a moderate return to labor and capital employed in working them. If they will not do this they are not *valuable* as mineral lands.

The patent having issued May 31, 1870, the question and case seem specially referable to that date; but no objection has been made to the consideration of the testimony of wit-

nesses whose examinations of the land and acquaintance with it have been subsequent to that date.

By the act of Congress of March 3, 1853, regulating the survey of public lands in California, section 3, (10 Stat., 245,) it is—

"Provided that none other than township lines shall be surveyed when the lands are *mineral* or are deemed unfit for cultivation, and no allowance shall be made for such lines as are not actually run and marked in the field and were actually necessary to be run."

This was the law of the locality when the first subdivisional survey was made in the township, and when the patent issued under which McLaughlin holds title, and it remained in force until July 9, 1870, when repealed by the act of that date, (16 Stat., 217, sec. 16,) as follows:

SEC. 16. *And be it further enacted*, That so much of the act of March third, eighteen hundred and fifty-three, entitled "An act to provide for the survey of the public lands in California, the granting of preëmption rights, and for other purposes," as provides that none other than township lines shall be surveyed where the lands are mineral, is hereby repealed. And the public surveys are hereby extended over all such lands: *Provided*, That all subdividing of surveyed lands into lots less than one hundred and sixty acres may be done by county and local surveyors at the expense of the claimants: *And provided further*, That nothing herein contained shall require the survey of waste or useless lands.

Therefore, when said patent issued, it was unlawful to survey the quarter-section in controversy if it was "mineral land."

"All mineral lands" were excepted "from the operation" of the grants to the railroad company in 1862 and 1864. They were likewise excepted from the operation of the various grants to the State of California in the act March 3, 1853, and from preëmption rights, as well as withdrawn

from subdivisional survey by the surveying officers. (10 Stat., 244.)

In 1866 Congress (14 Stat., 251,) enacted what this Court has called "a complete system for the sale and other regulation of its mineral lands."

Mining Co. *vs.* Consolidated Mining Co., 102 U. S. Rep., at p. 174.

Sections one and two of the act are as follows:

Be it enacted, &c., That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

SEC. 2. *And be it further enacted*, That whenever any person, or association of persons, claim a vien or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

The inquiry is suggested whether by that law the line of demarkation between the mineral and non-mineral lands was fixed for the time being. If yea, then the mineral

lands that could be sold under that act were lands containing "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper," * * * "improved according to the local customs or rules of miners," &c. Here is something explicit. It describes veins or lodes of ores capable of improvement and use as mines. If this law designated the "mineral lands," so long as it remained in force, and unchanged, then I claim that the evidence in the case shows that the land in contest was not mimeral land, because it shows affirmatively that there is not any vein or lode of the precious metals to be found upon it.

But if another view be taken; if this act of 1866 *did not define the mineral lands* while it was in force unaltered, but only provided for the sale of a certain class of them, then we are carried along to the further legislation of July 9, 1870, sec. 12, (16 Stat., 217,) providing for the sale of "Placer claims," as mineral lands, and to the act of May 10, 1872, (17 Stat., p. 91,) which does contain a definition, and is as follows:

Be it enacted, &c., That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

This section is referred to as the foundation of paragraph 2318 of the Revised Statutes, as follows:

"Sec. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise directed by law."

Both these enactments were prior to the institution of this suit, and such being the case, it is clear that the United

States cannot recover in this case without affirmative proof that the land in contest is "*valuable for minerals.*"

Further Propositions for Argument.

2d. I propose to show from the record, that the quarter section in controversy was in the regular and proper administration of the land laws by the executive officers, ascertained to be non-mineral land, as such had been regularly surveyed and returned, and was patented on the 31st of May, 1870, to the said railroad company, and that this quarter section of land was never surveyed and returned as mineral land, at least that the evidence in the case shows but one survey, and by that survey there was a return of the land without any designation of minerals.

3d. I claim that the burden of proof is upon the appellee, complainant below, and that the evidence submitted by the complainant, even without considering that of the defendant, fails to show the land to be valuable for cinnabar, as alleged in the complaint.

The record discloses an attempt by the complainant to discredit the original survey of the northeast quarter of section twenty-nine, township one north, range one east, and to exhibit a *subsequent survey of adjoining land as the authentic survey of this land.*

A copy of a letter of the Commissioner of the Land Office, dated March 14, 1874, was offered in evidence by the United States *and objected to,* (Record, 113, margin 470,) annexed to the testimony, and marked Exhibit D. (Record, p. 191.)

This was introduced for the purpose of showing that the NE. ¼ of Sec. 29 had not been surveyed prior to the issuing of the patent, and that the true plat of the township had been filed with the register, October 17, 1873. The testimony of witness NcNee, (p. 113, margin 472,) tended to show

that the last map filed, October 17, '73, had returned this quarter section as mineral land. The same witness recalled (Record, 177, margin 744, 745, 746, 747, and Record 178, margin 748 and 749) gives an explanation in detail, which corresponds with the true state of facts. He says the plat of survey of the township was filed with the register July 19, 1867, that that map showed the N. ½ of the NW. ¼ of Sec. 29, and thereon the figures "80," also the NE. ¼ of the section and the figures "160," which figures denote the area of the said tracts, and there was "*no writing upon it*," that is, on the NE. ¼, that there was no mark or indication that the quarter was mineral land; but upon the N. ½ of Sec. 30 there was the word "cinnabar."

The United States also introduced the field notes of the subdivisional surveys made by John C. Partridge, January 14 and 15, 1873, which the attorney for the complainant called "putting in," "in regular form, the field notes of the last survey," and which field notes are on pp. 187, 188, 189, of the printed record.

All this evidence is inadmissible for the purpose of impeaching the "letters patent, issued in due form of law," on the 31st May, 1870, because with the issuing of that patent, and whilst it remained uncanceled by judicial decree, the executive authority over the land had terminated.

Moore *vs.* Robbins, 96 U. S., 530.

It has also been decided by this court that a second survey of land, after the United has parted with the title, is inoperative to affect the title conveyed by the patent. The Government was bound by the original survey. (Lindsey *vs.* Hawes, 2 Black, 560; also, R. R. Co. *vs.* Shurmier, 7 Wallace, 273, at middle of p. 289.)

The pleadings allege the regular issuing of the patent in due form of law; and the proceedings under the railroad grant, and prior to the patent, embrace a recital that the

lands are duly surveyed, and not returned or denominated as mineral lands. (Record, 178, margin 751.)

Perhaps it is unnecessary, but I have very carefully sifted and compared what appears in the testimony concerning the survey of the tract in controversy, and shown, as I believe, in the latter portion of this brief, that the northeast quarter of section 29, township 1 north, range 1 east, was regularly surveyed and returned as non-mineral; and that the survey by Patridge in 1873, and his field-notes and return, do not embrace or relate to the northeast quarter of section 29, but only to those parts of that section, and to sections 30, 31, and 32, that had not been surveyed in 1867, because regarded as "unfit for cultivation," and having "indications of cinnabar," and consequently not liable to be surveyed in 1867.

III.

3d. Coming now to my 3d proposition, I remark that the patent for the northeast quarter of section 29, having issued in "due form of law," after the regular survey and due examination of the tract determining that it was of the description of land granted by Congress to the railroad company, the affirmative propositions of the bill in this cause must be satisfactorily supported by the evidence, otherwise the bill must be dismissed.

The bill describes the land as "containing *valuable* quicksilver and cinnabar deposits." The replication says, "said land contained *valuable* deposit of quicksilver in rock in place, as well as cinnabar in surface earth."

It is not every trifling deposit of ore that will make a tract of land "mineral land."

This remark is sustained by a recent decision of the supreme court of Nevada, at the October term, 1880, made since the decree in case at bar was entered in the United States circuit court for the 9th circuit.

(15th Nevada State Reports, 405, Merrill *vs.* Dixon *et al.*)

The action was brought to recover 398 cords of wood that had been cut in 1877 from the west half of section 9, township 21 north, range 19 east, for the Poe Mining Company, and sold to plaintiff by the sheriff as the property of said mining company.

The defendants claimed the wood, as owners of the land, under a conveyance from the Central Pacific Railroad Company, and it was conceded that the land belonged to said railroad company at the time the wood was cut, unless it was mineral land, and as such excepted from the railroad grant of 1862 and 1864.

The map of the Government surveys was offered in evidence to show that the land was mineral land. Objected to, and the objection sustained. I quote the language of the court:

"For the purposes of this case, we shall consider that all mineral lands which were intended by Congress to be excluded and excepted from the operation of the grant to the railroad company, were excluded and excepted by the patent conveying the lands to the said company upon which this wood was cut. And, although we are strongly impressed with the idea that the plaintiff's relation to the title is not such as to allow him to question the validity and efficacy of the patent (Dall. v. Meader, 16 Cal. 324), still, it being unnecessary, that subject will not be considered.

"Counsel for plaintiff says in his brief, that the reason why the testimony of Barker was offered, was 'to show that the land on which the wood was cut had been returned and denominated mineral lands.' But suppose it was so returned and denominated?

"That fact would not tend to show that the land was such mineral land as was excepted and excluded by the grant. The text of the act of 1864, as it appears in 13 Statutes at Large, at page 358, is as follows: 'And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation, or mineral lands, or the improvements of any *bona fide* settler, or (on) any lands returned and denominated as mineral lands. * * * The word "or," last used in the sentence quoted, should read "on." (See 2 Lester's Land Laws, 123.) So the statute should read as follows:

"'And any lands granted by this act * * * shall not * * * include * * * any mineral lands, or the improvements of any *bona fide* settler on any lands returned and denominated as mineral lands.'

"The witness, Barker, did not pretend to know anything about the lands embraced in section 9. He did not know whether they were at all valuable for mining purposes. He simply knew they were returned and denominated upon the map as 'copper, gold, and silver-bearing quartz.'

"After the company's patent from the Government was admitted in evi-

dence, the burden of proof was upon plaintiff to show, admitting he was in situation to demand the right to do so, that the tract described therein was, in fact, such mineral land, that it was excepted from the operation of the grant and by the terms of the patent. Neither the map nor the testimony of Barker, tend to show that fact. It can only be claimed that the map showed, *prima facie*, that there was, upon the section, 'copper, gold, and silver-bearing quartz'; but it did not tend to show whether it was there in quantity or quality sufficient to make the land valuable for mining purposes, and if that was not shown, proof of the *prima facie* fact just mentioned did not tend to show such mineral lands as are excluded from the grant.

"In excluding mineral lands, Congress only intended to exclude lands valuable for mining purposes. It is only valuable mineral lands and deposits that are reserved from sale, except as provided by law, in respect to mineral lands. (See U. S. Rev. Stats., secs. 2318, 2319.)"

In Alford *vs.* Barnum, 45 Cal., 484, the court said:

"But it is contended by the defendant that the land in controversy was 'mineral land,' and so within the reservation of the act of Congress of July 1, 1862, and July 2, 1864, by which public lands were granted to the railroad company, and within the exceptions and reservations of the patent which, in this respect, follows the terms of the grant. * * *

"The mere fact that portions of the land contained particles of gold, or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land within the meaning of the acts referred to. It must at least be shown that the land contains metals in quantities sufficient to render it available for mining purposes. Any narrower construction would operate to reserve from the uses of agriculture large tracts of land which are practically useless for any other purpose, and we cannot think this was the intention of Congress.

* * * * * * * * *

"It is well known that it is the constant practice of the Land Department to allow lands returned, denominated, and claimed as mineral lands to be purchased as agricultural lands upon satisfactory proof that they are not valuable for mining purposes.

"The judgment and order appealed from are affirmed."

On examination we find that the proof fails to establish the allegation that the land was and is mineral land.

It shows that there is no vein, lode, or ledge of cinnabar on this quarter section.

Joshua Marsh, witness for complainant, on cross-examination, questions 55 and 56, Record, p. 16, testifies:

Question 55. Has there been any ledge found on this land?

Answer. No, sir; I think there hasn't been any ledge found on the land. The richest they ever have got is in the dirt. Some is in the rock part of it.

Question 56. Has there been any cinnabar ledge found anywhere there?

Answer. They say they have got a ledge at the Welch mine, but I don't know of any.

J. H. Welch, from whom the Welch mine on the SE. ¼ of sec. 29 was named, Record, p. 37, says:

Question 105. Did you ever trace a quicksilver ledge, or see one?

Answer. Yes, sir.

Question 106. Where?

Answer. Up there.

Question 107. A quicksilver ledge up there?

Answer. What we took to be a ledge; yes, sir.

Question 108. Can you tell what a ledge is?

Answer. A ledge is rock in place, I suppose; rock that is together, not thrown about; that is what I understand by a ledge.

Question 109. On this land in question here have you found any quicksilver ledge?

Answer. No, sir.

Mr. WISE, p. 47:

Question 266. When, Mr. Welch, did you ever find any quicksilver in any place where you had got entirely clear of the dirt, and it was in the rock? Did you ever?

Answer. Oh, yes, sir.

Question 267. On this land?

Answer. Not on that land; no, sir.

Question 268. Whenever you found quicksilver on this land it was rock, and earth, and quicksilver, and other things mixed?

Answer. Yes, sir.

J. L. Shannon, for the United States, Record, 71:

Question 128. What you saw and took to be cinnabar, was it in dirt, or clay, or rock, or was it in all three, or how was it?

Answer. All three, sir.

Question 129. Did you see any ledge?

Answer. I didn't see any ledge of quicksilver rock—what I would term a ledge.

Isaac T. Sherman, p. 77, in answer to question 57, said he did not see anywhere on the 160 acres anything that looked like a real ledge.

C. A. Bramlet, for the United States, was uncertain as to the exact place at which he found some ore, but replied as follows, p. 109:

Question 89. What did you take it out of?
Answer. I took it out of the boulder.
Question 90. You saw nothing but a boulder?
Answer. I saw several.
Question 91. You did not see any ledge?
Answer. No, I did not.

Jacob Bendixen, for defendant, p. 118, testified:

Question 37. Is there any ledge on this land in controversy?
Answer. Not to my knowledge, sir.
Question 38. Have you made a thorough examination of the quarter section?
Answer. I think I have, sir.
Question 39. Did you ever find any trace of a ledge on that quarter section?
Answer. I did not, sir.

Same witness, on cross-examination, p. 132:

Question 270. You say there is no ledge, to your knowledge, upon that ground?
Answer. There ain't, sir.
Question 271. The Welch Consolidated Quicksilver ledge ends how near that ground where you have prospected it?
Answer. I could not tell; we never was deep enough by a good many hundred feet to tell.
Question 272. How far from this piece of ground did you strike that ledge?
Answer. Well, I suppose about—well, in some places the cropping all came to the line within a hundred yards, and probably in other places it wouldn't come near so close.
Question 273. What is the main direction of that ledge, north and south?

Answer. It runs east and west—northwest and southeast about, is the nearest you can get to it.

Wm. Mulligan, Record 143, margin 596, says he saw no re[de]fined ledge—would not call the Welch Consolidated a ledge.

T. J. Crandell, for defendant, p. 148, testified:

Question 11. With regard to the ledge that they have got on the Welch mine—have you ever worked on that ledge?

Answer. I have—very little, though on the ledge. I worked outside mostly when I worked there at the mine.

Question 12. How far is that ledge from the Powell claim?

Answer. Well, the line runs—how far is the ledge?

Question 13. Yes, sir.

Answer. I don't know exactly. It must be four or five hundred feet to the ledge—that is, what they call the ledge.

Question 14. Is Powell's down hill or up hill from this ledge?

Answer. Powell's is down hill from this ledge for a ways, and then it is up hill. It is down hill until you pass the reduction works.

Question 15. Do you know where the gulch is?

Answer. Yes, sir.

Question 16. Is that gulch down hill from the ledge?

Answer. That gulch is down hill from the ledge, sir.

Question 17. Can rocks and boulders be carried from that hill down to that gulch by rains and floods?

Answer. Very easily, sir.

Question 18. Are there a number of boulders that have been carried by rains and storms down the hill?

Answer. Yes, sir.

Question 19. Have you examined them with reference to that subject at different times?

Answer. I have; I have never seen them rolling down, but I have seen that they were boulders, and that they must have come down that way.

Mr. Richard Taylor, a comparative stranger to the locality, is, I believe, the only witness who says that he saw

indications of a "vein," and that ore which he found on the surface indicated the existence of a vein. (Record, pp. 50 and 51, margin, 201–202.) But he appears to be speaking generally of the region about the Welch mine. He says that the surface ore would yield two or three per cent. of cinnabar, and that ore yielding three per cent. will, in his opinion, "pay" to reduce it, (p. 51.)

This witness said he had been sent up there to examine the Welch mine and several other places, by Mr. Parrott, Mr. Tom Bell, and others. But Mr. Bell was called by the defendant, and denied knowing Taylor and denied having employed him to examine quicksilver mines. (Record, 176.)

The proof, therefore, shows that there is no known vein, lode or ledge of cinnabar on this quarter section, and that there are no indications of one.

But there is some cinnabar ore there; and the question arises: Is this good mining ground?

Thomas Priaulx, for complainant, Record, p. 23, testifies:

Question 28. Did you ever see on this land any ledge?
Answer. No, sir; not that I know of.
Question 29. The quicksilver that you found, was it in the soil or in the rocks?
Answer. In the rocks, and some in the soil, too.

* * * * *

Question 32. What you say you saw that you called quicksilver rock, didn't it look as if it had been broken off from somewhere? I am, of course, only asking for your opinion; you cannot tell whether it was or was not. Did it appear to have been, or not?
Answer. I should judge it would been.
Question 33. How much of that rock did you see on this land?
Answer. I should judge about three or four ton
Question 34. Where, on this land?
Answer. Yes, sir.

Jonathan Donner, for complainant, said he knew the quarter section in controversy. (Record, p. 28.)

Question 10. Does the land contain mineral?
Answer. Yes, sir.
Question 11. What mineral?
Answer. Cinnabar.
Question 12. Have you worked upon the land?
Answer. No, sir.
Question 13. Upon what portion of the land have you seen that cinnabar?
Answer. Well, I seen it pretty much all over it in different places, particularly on the southern portion of it.
Question 14. State whether you have seen and examined the rock in an open cut in that place?
Answer. Yes, sir; I have.
Question 15. Describe that open cut and what it contains?
Answer. Well, it contains rock and dirt.
Question 16. Well, as to cinnabar?
Answer. The dirt contains cinnabar. It has been taken out of that, and the rock contains cinnabar that comes from this open cut.

At pp. 29 and 30, margin 113, 114, this witness says he has prospected over the surface of the quarter section in question, and found cinnabar. Took out over one pound. He found it in "loose rocks and dirt." Prospected with a pan. (Margin 117.)

J. H. Welch, on cross-examination this (p. 40:)

Question 148. How do you find the mineral?
Answer. Well, in the rocks; some big ones and some little ones, and some dirt. Where you do not find rock, if the ground looks favorable, you take a pan and pan it.
Question 149. You mean to say that almost all over this quarter section you can find some traces of metal?
Answer. Yes, sir.
Question 150. Did you ever find any metal in any quantities on this quarter section that would pay for working?
Answer. Yes, sir, some. I think it would pay. I don't know as it would.
Question 154. All over this quarter section, and all around

the neigborhood there, there are a great many little prospecting holes dug, are there not?

Answer. Yes; a good many.

Question 155. Most of them have been abandoned, have they not?

Answer. Yes, sir; a great many of them have been abandoned.

Question 156. When did they first commence prospecting for metals in that section of the country?

Answer. I don't know exactly; it was a good while ago, though.

Question 157. When, as near as you can remember?

Answer. It must have been before 1860, anyhow, or about 1860, I should think.

Question. And they have been prospecting there ever since; digging little holes and leaving them?

Answer. Little holes and big holes.

John Grummett was called by complainant, but on cross-examination said he first examined the lands about two years ago, (record, p. 85:)

Question 60. Did you discover anywhere upon this land any mineral ledge?

Answer. No, sir.

Question 61. All you saw was these little pieces of rock and this earth and clay that you think contained quicksilver?

Answer. The large rock was in this cut; the small rock was in different places over the land.

John Donner, Sr., (record, 90,) a few days before he testified had taken some ore that he had obtained from the land by panning to Mr. Strong to be assayed. (Mr. Strong (p. 96) testified that the ore presented by Mr. Donner had assayed 6.8 per cent. of quicksilver.

C. A. Bramlet, (p. 105, margin 437,) selected a piece a little larger than a hen's egg, and obtained a lady's thimble full of quicksilver.

For defendant, *Mr. T. J. Crandell*, testified (record, p. 149, margin 624,) that the working of the Welch mine, on

the southeast quarter of section 29, had been unprofitable. He says that the only place where he saw cinnabar, on the northeast quarter, was on "the cut," there he saw a large boulder, but the quantity of ore in the rock amounted to nothing.

J. W. Strickler, for defendant, examined that locality, and the Welsh mine. He says, (p. 158, 159:)

I found it situated on the side of Mount Diablo—the north side—where the base of the mountain seems to rise very abruptly from the surface, and this is on the edge of the base of the mountain, some—I would guess—one hundred and fifty feet above the level of a ravine, below, or north of the Welch mine, on which reduction-works are situated, and which reduction-works are situated on the northeast quarter of section 29, the claim in question, and where, from all appearances, all of the ores that have from time to time been worked by the various companies attempting to work the Welsh Consolidated (so-called) quicksilver mine have reduced all their ores, and where they take all these ores to, from the southeast quarter, or Welsh mine, to reduce them; the furnace and reduction-works being on the so-called Powell claim, that being situated at the bottom of the ravine, in a little flat containing some two or more acres of flat land, or not flat, but with a gradual descent; thence down to the eastern line of the northeast quarter of the said section 29, the claim in question. The ravine, I believe, runs there. If I mistake not, all of the ravine passes through the Powell claim; and all of the cinnabar that is in that ravine seems to have come there from these reduction-works, or from the hillside north (south) of it, the mountain side, on which the Welsh Consolidated quicksilver mine is situated. It seems so, for having examined the northern side of the ravine, on which the bulk of the Powell claim, so called, or the claim in question, is situated, I find no evidences of cinnabar whatsoever. Across the hill, north of the Welsh Quicksilver Mining Company's reduction-works, a little east of north there is a tunnel run twenty-one paces into the hill through the rock. I saw some cinnabar. Mr. Mulligan examined that with me; we placed it—measured it. I saw some cinnabar at the mouth of that tunnel that evidently was carried there from some other point, there being no

seam visible in the tunnel, which was run by Mr. Oglesby, it is said. Of my own knowledge, I don't know who run it; but at any rate the tunnel was there, and there was no visible evidence of quicksilver in that tunnel that I could find. I saw some quicksilver boulders—rock in a ravine on the northern side of this claim, where, in 1866, I think, Widow Rogers lived, on this same quarter section, the quarter section in question; I saw some quicksilver boulders in that ravine that looked to me as though they had been packed there. They had been broken off—had been mined; and there is no hole, no place dug out on the surface from which they could have been taken visible to me. And I examined with a view of determining for myself whether or not that was a quicksilver-bearing quartz section, and I saw there those boulders. Otherwise I have seen no evidence whatever of quicksilver on that land.

Question 11. The ledge on the Welsh quicksilver mine, what kind of a ledge is it?

(OBJ.—Objected to as immaterial.)

Answer. Well, Mount Diablo seems to be a solid mass of rock. Of course here and there there is a little piece of earth. It is a kind of blue sandstone; that is, there is some sandstone in it. It seems to be a primitive rock, some portions of it. It is a conglomerate, so called, at least I have been so taught to call it—a conglomerate mass; and in this rock we find little seams of quicksilver. We found boulders at the base of this mountain, on the *southeast* quarter of section 29, immediately south of and adjoining the claim in question, and about four hundred yards, I should say, from the southern line of the claim in question we found large boulders of sandstone and conglomerate rock—a kind of blue shaly rock, interspered with quicksilver—I mean cinnabar. Some of it is quite rich in spots, and some of it is not rich. Some of looks as if it was limestone, and I think there is some limestone mixed in with it, and that seems to be the character of the rock. There is some shale—considerable shale there. What is called shale, a rock of a slaty nature.

This witness says, (p. 160,) that he examined all the holes he could find, and the tunnels on the NE. ¼ of section 29,

and found no such evidences of cinnabar as he had observed on the SE. quarter.

It is shown by the testimony of Phillips and Bendixen for defendant that all the quicksilver mining in that vicinity has been unprofitable. Three times the Welsh mine on the SE. ¼ of section 29 has started in the last twenty years, and three times it has shut down.

Not only the Welsh mine, but the cut and tunnel on the Powell claim were, at the time of taking the testimony, in an abandoned and deteriorated condition, with no prospect of recovery. The tunnel was the work of Oglesby, and not of Powell, done some years ago.

The witnesses all agree in stating that the rocky boulders containing cinnabar ore are found in the ravines or gulches, the places they would naturally find if they had, in remote ages, been separated from the mass of Mount Diablo, which overshadows this land, rising from it 3,000 feet in three miles, with a continuous ascent.

If I can understand the record, the complainant's witnesses, except G. W. Strong, testified between June 26 and July 7, 1877. (Record, pp. 12 and 114.)

The defendant's witnesses testified, beginning August 16 and ending October 9, 1877. The depositions of both parties, before that time taken, were filed in court October 9, 1877. Record, 115, margin 479; and 187, margin 788.

On page 178, margin 750, we find the date October 31, 1877, which date appears to be that of the recall of R. F. Knox and of the deposition of G. W. Strong, but whether that be true or not, it appears, from Mr. Strong's testimony, that he examined the land in contest in the latter part of August, 1877, after the testimony had been given by the other witnesses for the complainant, and after the principal witnesses for defendant, Bendixen, Mulligan, Crandell, and Strickler, had testified, August 16, 1877.

G. W. Strong testified in rebuttal for the United States,

and, on an examination, his testimony is evidently adapted, if not intended, to fill up a palpable deficiency in the evidence in the case when the complainant's evidence was first closed.

Late in August he examined the Powell claim.

He says, p. 181:

Answer. We found a place which is called the Powell mine. It is known by that name there. We found cinnabar there. We dug down in the hard rock, and put in blasts and blew it out, and found good rich rock.

Question 12. Was that upon the surface of the ground?

Answer. No, it was in a cut. It was in the cut along the south line. * * *

Question 16. How deep is that cut at the end of the cut next to the bank?

Answer. Well it is—I could not say how many feet, but it seemed to have been filled up some.

Question 17. Fifteen or twenty feet?

Answer. It possibly has been that much, but I could not say positively now. It is sloughed in; filled in along down the middle. Where I dug down and put in the blasts it was very solid, and to considerable depth. I cannot say how many feet, probably 10 or 12 feet; something that way.

Question 23. What per cent. would you judge the rock to be?

Answer. Well, I should say it was from 3 to 10; somewhere along there. Of course I could not state exactly. It seemed to be a rich deposit there.

Question 24. State whether there was any appearance of that having been a slide from the mountain.

Answer. Well, I examined as to that matter. I did not consider it to be a slide. I thought it was fixed there. It was not a slide.

Referring to the diagram X, found on p. 193, the witness says, p. 183:

Question 55. Look at this diagram marked "X." State whether that is a fair diagram of the mine as you saw it.

Answer. It is not a correct diagram of anything particularly, but it is approximating to it, I might say. His house is here (showing), and barn, as I saw it; this creek passing down between there and the county road passing down there. I know by this that I was on that ground there.

The effect of this statement is to cause us to doubt whether the witness really knew the locality of the land in controversy, and the relations of lines and objects to each other. It is certain that the diagram does not truly represent the section lines of the United States surveys.

If that map was used to show him where to go, or to help him find the land or the Powell house and the Welch mine, then he must have gone wrong.

This witness is also confronted by his own history. He has been a metallurgist and assayer twenty-one years; has handled cinnabar ores twelve years; has been living in San Francisco, only thirty miles or so distant, and he comes up to Mount Diablo in the end of August, 1877, for the first time, though, as Welch says, Record p. 40, the region had attracted attention as far back as in 1860, when it was first prospected.

Though the United States has called seventeen witnesses, some of whom have been prospecting in this region ten to fifteen years and more, and some have known it twenty years, no evidence has been given of any productive mining on this land, and the mining at the Welch mine, upon richer and larger cinnabar deposits on the southeast quarter of the section, has not been profitable.

The witnesses do not know of any profitable mining having been done on this quarter section, and are in doubt whether the more massive and richer rock found on the Welch claim has ever been, or can ever be, profitably worked.

J. Marsh (Record p. 30, Ques. 61) is not able to say that

any profitable mining has ever been done in the Mount Diablo mining district.

One William Ryder Powell is mentioned by nearly all the witnesses as being upon this land. It is called *the Powell claim.* Several witnesses say they were summoned or requested to attend by Powell, to give their testimony in behalf of complainant before the examiner.

Let us, therefore, investigate Dr. Wm. Ryder Powell, the bonanza king, that the United States shows to us, in the testimony in this case, as the man who has occupied and used this place for quicksilver mining.

Joshua Marsh, p. 14, for the United States:

Question 26. Mr. Marsh, is the land occupied or unoccupied?

Answer. Dr. Ryder Powell has been occupying it; I saw him there a good many times.

Question 27. How long has Dr. Ryder Powell occupied that land?

Answer. According to the best of my knowledge, since 1866.

Cross-examination, Record, 15:

Answer. No; there is no farming on my land; and on this of Dr. Powell's there is about five acres that he farms a little, that is, by raising hay, a little grain for hay—about five acres—four or five acres.

Question 33. How many years did you say you run your sheep on this land?

Answer. Well, between three and five years. I have been running them across on my land, and run them over there.

Question 34. How many sheep did you have?

Answer. I had from four hundred—when I got through with them I had over a thousand head. I took them on shares, most of them; I had only a few of my own.

Question 35. You raised them on this land and on other land like it in the neighborhood?

Answer. I run them across it. I kept them on this more on account of the water; there was good water there.

Pages 16 and 17:

Question 58. How many years have you known Mr. William Ryder Powell on this land?

Answer. About 1866; I knew him before that.

Question 59. I mean on this land?

Answer. 1866 he came there, to the best of my knowledge.

Question 60. What does his family consist of?

Answer. He hasn't got no family here. He makes it his home there. I don't know whether he has got any family there; that is, none that I know of. That is, I never saw no family.

Question 61. How does he make his living?

(OBJ.—Objected to as irrelevant.)

Answer. I could not say how he does. He is shearing sheep sometimes, and works sometimes for farmers at harvest. I have saw him doing both. He has sheared for me, and for others.

Question 62. Where has Mr. William Ryder Powell kept his sheep.

(OBJ.—Objected to as irrelevant.)

Answer. I don't think he has any sheep. He sheared for me and he sheared for the neighbors there.

Question 63. What use has he made of this land, if any?

Answer. He hasn't made any use of it, except to let any one run across the place there. He hasn't charged me anything. I couldn't say whether he has charged any one or not. It has been a commons; everybody has had it.

J. H. Welch, examined for complainant, (Record, pp. 35, 36.)

Question 66. Who occupies the northeast quarter?

Answer. Dr. Powell, I believe. He lives there.

Question 67. Since when did Dr. Powell occupy the land?

Answer. The first I knew of it was in 1866.

Question 69. What improvements, if any, has he now, at the present time, on the land?

(OBJ.—The same objection.)

Answer. Well, he has got a house and a barn, and a small piece fenced in with a brush fence, besides the mining improvements he has made.

Question 75. You state that Dr. Powell has occupied the

land since 1866. Do you know what work he did upon that land during the years 1866 and 1867?

Answer. I don't think he done any mining.

Question 76. The same question as to 1868 or 1869?

Answer. Well, I don't know of any. In '68 and '69 I was not there.

Question 77. Do you know of his doing any mining at all upon the land?

Answer. Yes; since 1870.

Question 78. What years do you know of his mining the land?

Answer. *I think it was* 1870 *or* '71, the first that I knew anything about it.

Question 79. What did that mining consist of?

Answer. There was some of these holes and cuts that he run; part of them then and part of them since; and some of them has been run farther now than they was then.

Mr. Welch, who is well acquainted with the history of the locality, gives us a bird's-eye view of the entire premises on cross-examination, (p. 44.)

Question 220. I mean to say on all of this quarter section that we are speaking of now, after you dig down a little distance you get clear of the dirt and come to the rock?

Answer. You would in some parts of it. The holes that I dug we didn't get through, so I could not tell. The cut was not through.

Question 221. Did you ever in any place there dig down entirely through the dirt and come to the rock?

A. O, yes, sir.

Question 222. After you dug down and came to the rock, did you find cinnabar in the rock?

Answer. I never dug down but in one place, and there was none there.

Question 223. So that all the cinnabar that you ever found was mixed with the dirt and rock?

Answer Yes, sir.

Question 224. When did you first know this mining district?

Answer. In 1862. I have been in there a few times before, when they were prospecting in it, but I was not much acquainted until 1862.

Question 225. And you have known it ever since?

Answer. Yes, sir.

Question 226. Since 1862, up to this time, have you ever known any individual or any company or companies to be successful in mining there—make any money?

Answer. I don't know whether they did or not. I did not keep their books, and of course I had no means of knowing.

Question 227. You say that Powell has a house and barn on this land?

Answer. Yes, sir.

Question 228. What did he have the barn for?

Answer. I don't know. He built it, thinking he would save some hay, I guess; sometimes he does get a ton or two.

Question 229. On the land.

Answer. Yes, sir.

Question 230. Does he do any farming?

Answer. That is all I know. He would sow a little wheat on the place to get hay. When he does it sometimes the squirrels gets it and he don't get any.

Question 231. If it were not for the squirrels then, he would get some.

Answer. Yes, sir; he would get some.

Question 232. You say he has some mining improvements. What do his mining improvements consist of?

Answer. I believe I have described them. They consist of holes, cuts, and tunnel.

John Grummett, on cross-examination, (p. 85:)

Question 57. How did you make Powell's acquaintance?

Answer. He was shearing sheep up in the mountains close by where I live. I got acquainted with him by his being at work there.

Question 67. How long since you were asked to come here and be a witness?

Answer. Well, probably within ten days or two weeks.

Question 68. Powell asked you to come, did he not.

Answer. Yes; he subpœnaed me to come.

Wm. Ryder Powell is a man who does not support a family; has lived on this land part of the time since 1866;

did no prospecting before 1870, and set up no claim to it until 1874.

He was engaged in shearing sheep, raising hay and grain, but did no mining until 1870 or 1871. He built a house and barn for his agricultural needs, and dug holes, and assumed the ownership of a "cut" and tunnel, both now in a dilapidated state. In ten years we have heard of one thimbleful and one ounce of quicksilver having been obtained from the premises.

Powell has not led the mining board at San Francisco, but, when first encountering Bramlet, a couple of years before this trial, (if I can gauge the time,) he was still sheep shearing—the business which received his attention in 1866 and earlier.

The history of Powell shows the fact, that this land is not mineral. He has lived on it ten years. His house and barn are maintained in good condition, but his holes and cut and tunnel are abandoned and deteriorating, and he seems to be as poor or poorer than when he began mining. Perhaps we may say, having found mining unprofitable, he has gone back to sheep-shearing.

I, of course, suppose that when this action began the Attorney General believed that a grievous mistake and wrong had occurred in the issuing of the railroad patent, but the evidence in the case does not show it—does not sustain an affirmative; but, on the contrary, shows *that no mistake was made about this* quarter section. It is not and was not mineral land.

One of the witnesses, Taylor, says this land is about 25 miles from Oakland, say 30 from San Francisco; one or two say that the region has been prospected for cinnabar for 12 to 15 years. Powell, a single man without family, living there 10 years, has tried mining without favorable results. Whether the cinnabar ores found would pay for reduction is a point on which the witnesses thus far agree; they say with appliances in use and heretofore used they will not.

Some think that with improved facilities and machinery they would—others that they would not.

If there is any doubt here, we may turn to the history of quicksilver mining. From the articles, "Mercury," "Almaden," "Idria," in *Ure's Dictionary*, we derive the following:

"The geological position of the mercurial ores, in all parts of the world is in the strata which commence the series of secondary formations."

The mercury is evaporated at a heat of 662 Fahrenheit. The ores are roasted in furnaces, with which are connected a series of cold-air chambers for condensing the mercurial vapors.

The sulphides (cinnabar ores) at Almaden, in Spain, and Idria in Carniola (Idria is 28 miles N. E. of Trieste,) are rich in quality, and "massive" in form. The Almaden mines have been known from 700 years before the Christian era, and have been worked almost continuously. The lode is 14 to 16 yards thick. The mines are over 1,000 feet deep. The ores reduced average 10 per cent.—some contain as high as 70 to 80 per cent. of pure cinnabar.

The ores at Idria are equally rich. This mine has been worked since 1497—over 350 years. Both appear to be inexhaustible.

Watts' Dictionary of Chemistry, p. 883, "Mercury": The most abundant ore is the sulphide, or cinnabar, from which nearly all the mercury of commerce is obtained. Its most important mines are those of Idria, in Illyria; and of Almaden, in Spain. At Almaden it is found in veins, often nearly 50 feet thick, traversing micaceous schists of the older transition period; in Illyria it is disseminated in beds of grit, bituminous schist, or compact limestone of more recent date.

Encyclopedia Britannica, vol. 5, p. 784: Cinnabar is the native sulphide of mercury. * * It generally occurs in

fibrous or amorphous masses, bedded in slate-rock and shales, and more rarely in veins in granitic or porphyritic rocks.

Murray's Hand-Book for Spain, part 1, p. 220; (Almaden): The mine is apparently inexhaustible, becoming richer in proportion as the shafts deepen. The vein of cinnabar, about 25 feet thick, traverses rocks of quartz and slate, and runs towards *Almadenejos*. * * * * * The deepest shaft is said to be 1,000 feet, and the lode improves the deeper it is worked.

Baedeker's Southern Germany and, The Austrian Empire, (1868,) p. 343; Quicksilver mines of Idria: The mines are approached nearly in the center of the ancient town of Idria (1,488 ft.), by a flight of 787 steps hewn in the limestone rock. Drops of the pure metal are everywhere visible, adhering to the ore which is excavated by means of pickaxes. It is brought to the surface from a depth of 2,500 feet. * * * The annual yield averages 125 tons.

The quicksilver mines of California have reached an importance not secondary to those of Europe. The principal mines are those of New Almaden, Gaudalupe, and New Idria, and one in the Napa valley.

Those of New Almaden and Guadalupe are in the same range of mountains, some 15 miles apart only, and are said to be similar in all respects.

The New Idria mines are in a less frequented locality, and I have not met with authentic statements in regard to them.

Harpers' Magazine for June, 1863, contains an article written in 1857, by W. V. Wells in reference to the New Almaden mine, from which the following extracts are made:

* * * * * * *

The main entrance to the mine is a tunnel, commenced in 1850, in the side of the mountain, in a line with the patio, and which has already been carried to the distance of 1800 feet, by 10 wide and 10 feet in height, to the crown of the arch. * * * * *

We followed the glimmering candles, now down a slippery inclined plane, and again struggling up the precipitous base of some vein of cinnabar, which in its erratic course seems to have shot through the solid heart of the mountain, in much the zig-zag course that a drop of quicksilver would describe in rolling about the surface of a plate. * * *

We are now more than 200 feet below the patio and 600 feet below the summit of the mountain. * * *

A little farther, and we find a plank stretched across a narrow chasm, upon which two or three swarthy broad-chested miners are standing, drilling their way into the solid rock above them, where a rich lead has just been found. * * *

The ore is the native red sulphuret of mercury, with a specific gravity varying from 6.7 to 8.2. * * * The ore averages 36 per cent. * * * In the New Almaden mine the ore occurs in amorphous masses, in pockets and irregular veins, sometimes surrounded with a black clay, but often encased in a hard sterile rock or chlorite slate, which it is generally necessary to blast to remove. * * *

About 1,500,000 pounds were exported in 1854.

The ore of the New Almaden, which, as has been observed, is solely sulphuret of mercury, the rarest known, exceeds in richness that of any other on record. Although its average is 36 per cent., specimens have been found with the incredible yield of 72 per cent of mercury. * * *

In 1812, at the works of Idria, 56,686 quintals of ore yielded 4,832 quintals of quicksilver, or about 8½ per cent. * * * The mine is apparently inexhaustible. * * *

The mines in Idria were discovered in 1497, and have been steadily worked from that time.

* * * * * * * *

The Almaden mines in La Mancha set into the Sierra Morena in much the same manner that the New Almaden does into the Santa Cruz range. The first has yielded steadily for over two thousand years without diminution, and there is no likelihood of the latter becoming exhausted.

* * * * * * * *

If I have comprehended the elementary developments of nature that make up the requisites of a true cinnabar mine, yielding valuable commercial results, *rich ores* must

be found *in large masses.* Though inferior ores are reduced at the great mines, it is because they have been necessarily extracted from the mine in order to the removal of the masses of rich and valuable ore—yielding 30 to 70 per cent. of quicksilver.

In twenty years of prospecting, there has been nothing whatever developed upon the NE. ¼ of sec. 29, Tp. 1 N., R. 1 E., indicating the existence of large masses of rich ore under the surface where the prospect holes have been sunk to the rock, hard shale has been encountered.

The uninformed men of the vicinity of Mt. Diablo, who find employment in sheep raising and wool growing, have not the experimental or theoretical knowledge which would make it plain to them that the notion of obtaining quicksilver from little chunks of cinnabar ore, found by panning the dirt and gravel of the surface earth, is chimerical. The cost of the panning process is too great for the value of its results, and if the ore that is found on the NE. ¼ of Sec. 29, were delivered at a furnace, it would, as to quality, scarcely pay the cost to accrue from reduction; and, as to quantity, would yield but a few flasks annually. Both in quality and quantity of ore, the yield could never justify the labor of obtaining mercury from panning dirt upon this land, or breaking up and reducing the few boulders found in the gulches.

I have seen lately in the newspapers, a statement that the yield of the California mines to date has been over 100,000,000 pounds of quicksilver since 1846, of which 67,000,000 have been exported.

Comparing the results obtained from known mines in California, with the results of twenty years prospecting upon the NE. ¼ of Sec. 29, Tp. 1 N., R. 1 E., we see distinctly that this quarter section is utterly worthless for cinnabar ores.

FURTHER REMARKS UNDER THE SECOND PROPOSITION,

Showing that the Tract in Controversy was never Returned by the U. S. Surveyor as Mineral Land.

The plat of the survey of this quarter section was returned by the United States Surveyor General to the office of the register of the land office at San Francisco, in whose district the land lies, on the 19th of July, 1867, as is stated by Duncan McNee, a witness for complainant, and a clerk in the United States register's office. He the office continued to act upon that map un 1873. His evidence is so important, I quote

DUNCAN MCNEE, recalled for complainant by

Mr. HEATH:

Question 1. Look at the traced map now produced, and state what it is.

Answer. It is a map of part of township 1 north, 1 east.

(The map above referred to is offered in evidence by complainant's counsel, marked Complainant's Exhibit.)

Cross-examination by Mr. WISE:

Question 1. When was the first map of the northeast quarter of section 29, township 1 north, range 1 east, first filed in the United States land office, in this city?

Answer. On the 19th day of July, 1867.

Question 2. How long did the office continue to act upon that map?

Answer. Until October 17, 1873.

Question 3. Who sent the map to the land office?

Answer. The United States surveyor general for California.

Question 4. That was the regular way of transacting business?

Answer. Of course.

Question 5. Did not the department at one time notify you that a patent had been issued before the land had been surveyed?

(OBJ.—Objected to as secondary evidence.)

Answer. I believe so.

Question 6. And did you reply to that?

(OBJ.—The same objection.)

Answer. My recollection is we did.

Question 7. Have you got those letters here?

Answer. Yes, sir; on the 14th of March, 1874—letter "N"—the Commissioner of the General Land Office decided that the northeast quarter of section 29, 1 north, 1 east, was erroneously patented to the Western Pacific Railroad Company on the 31st of May, 1870. At that time the land in question had not been surveyed; that is what they say.

Question 8. Was that a fact, that it had not been surveyed?

Answer. It was not a fact.

Question 9. What did you inform the department in answer to that?

Answer. On the 30th of March, 1874, the register and receiver replied to that letter. Their letter commenced with the usual heading—"United States Land Office, San Francisco, March 30, 1874," and was as follows:

"Hon. WILLIS DRUM'OND,
Com'r Gen'l Land Office.

"SIR: Referring to your letter 'N' of the 14th in relation to the claim of Wm. Rider Powell to the NE. ¼ of sec. 29, T. 1 N., R. 1 E., we have now to report that we have this day called upon Charles McLaughlin, Esq., land agent W. P. R. R. Co., to surrender the title to said land to the United States.

"In this connection I would state that said land was returned as surveyed by the plat filed in this office July 19th, 1867, but was not returned as mineral land until Oct. 17th, 1873.

"Very respectfully, your ob'd't serv't,
"H. J. ROLLINS, *Register.*
"CHA'S H. CHAMBERLIN,
"*Receiver.*"

Redirect examination by Mr. HEATH:

Question 1. Have the field-notes for the map of July 19, 1867, been filed in this office?

Answer. I could not say.

Question 2. Will you look at the original map of the

section in question, filed July 19, 1867, and examine the entries made upon the north half of the northeast quarter, and state what writing you see upon that map?

Answer. I see on the north half of the northwest quarter the figures "80," and on the northeast quarter the figures "160," referring to the area of the same, eighty acres and one hundred and sixty acres.

Question 3. What writing do you see upon it?

Answer. There is no writing at all on those quarters.

Question 4. On the northeast quarter of section 30 what writing do you find?

Answer. On the north half of the northeast quarter of 30 occurs the word "cinnabar," or, to put it plainer, indications of cinnabar extend east and west along the north half of the northeast quarter of 30.

Question 5. What writing is there upon sections 30, 29, 31, and 32, with reference to the character of the land?

Answer. Steep mountains, unfit for cultivation; indications of cinnabar.

This evidence is given with the office-plat before the witnesses and the examiner. In the absence of a copy of the plat of the township, this testimony agrees with the fact that the patent issued for this northeast quarter, by a proper description, after the selection thereof had been duly examined in the register's office at San Francisco, and in the General Land Office.

Mark, also, that the witness says—and this is the complainant's evidence—that the traced map marked complainant's exhibit "is a map of part of township 1 north, range 1 east." *It is that, and nothing more.* This attempt to make anything else of it, to exhibit it as *the Government survey* of the land in controversy, is a total failure, as I shall demonstrate.

That diagram is made up from the original survey of 1867, as to the north half of the northwest quarter and the northeast quarter of section twenty-nine, a survey authorized by the act of Congress of March 3d, 1853, restricting surveys of public lands to those not mineral, and as to the balance of

section twenty-nine, and all of sections thirty, thirty-one, and thirty-two, it is made up from the field notes of the survey made by Partridge, in 1873, *after* the law forbidding the sub-division of the mineral lands had been repealed.

The legal result of both plats is that the northeast quarter of section twenty-nine was surveyed and returned as non-mineral land in 1867, and the southeast quarter was surveyed and returned as mineral land in 1873. The official boundary between the two descriptions of land is fixed on the line between the two quarter sections—leaving the northeast quarter unstained by any official return as mineral land.

Another Government witness besides McNee sustains my argument on this point. G. H. Welch, (at p. 39, margin 153), helped make a survey made by a surveyor, Thompson, in 1871, and says, "we had the lines run on one side of it, and they were before run on the other side. The north part of it was already surveyed."

The position I thus take is not in accordance with the certificate of H. G. Rollins, register at San Francisco, attached apparently to the diagram, but I am sustained by the field notes, and by the United States Surveyor General.

Mr. Rollins has certified that this diagram, or map, of a part of the township, as McNee properly calls it, is a "*correct copy of the original plat of township one north, range one east.*" We know that it is nothing of the kind by looking at it. Then we know that the register has no legal custody of *original plats*, and no legal authority to certify copies of them. This authority is by law given to the Surveyor General—and to him alone.

In support of this statement, I refer to sections 1, 2, and 3 of the act of March 3d, 1853, (10 Stat., 244.) Said section 3 carrying us back to the acts of 3d March, 1831, 4 Stat., 492; and section 10, act March 3d, 1803, 2 Stat., 233; and section 2, act May, 1796, 1 Stat., 464. These laws require the original plats of surveys to be kept in

books at the Surveyor General's Office; a copy to be kept open in that office for public inspection; another to be sent to the General Land Office; and a third to the local register's office. (Act 1796.)

These acts of Congress define the original plats of township surveys as those filed in the Surveyor General's Office, and he is the officer and the only officer invested by law with authority to certify to copies of the plats.

The Government offered in evidence "the field notes of "the sub-division lines of township one north, range one "east," "by John C. Partridge, commenced January 14, "completed January 15, 1873." (Record, p. 180, margin 757; found in detail, Record 187, 188, 189.

The Surveyor General, November 9, 1875, (p. 189), certifies to the copy from the approved "original field notes, as "the same remain of record and on file in this office."

The surveyor in his general description says: "The *portion of this township which I have sub-divided* is very rough and broken, and mountainous, and is more valuable for mining purposes than any other, particularly sections 29, 30 and 31," etc.

The surveyor speaks of the portion of the township he has subdivided in section 29, sections 30 and 31. His statement does not relate to any part of a section that he did not subdivide.

Now, what he had subdivided might have been less than all of each section named. *It was less than all of section* 29. The survey was one authorized by the act of July 9, 1870, and was intended to complete the survey of the township by extending the lines over the lands in the sections named that had not been surveyed in 1867, because then noted by the surveyor as "steep mountains, unfit for cultivation."

This is the truth—hard to find from these papers, yet disclosed by them on a critical examination—viz: the northeast quarter of section 29 was surveyed in 1867 and returned

as agricultural land; the southeast quarter was surveyed in 1873 and returned as mineral land.

Look at the field-notes of Partridge, and we see he did not survey a line or place a monument beyond what was needful to survey the southeast quarter of the section.

He began his survey (p. 187, margin 789) at the northwest corner of section 29, viz., "corner to sections 19, 20, 29, and 30, *already established*," thence south to the southwest corner of 29, viz., "corner to 29, 30, 31, and 32," (margin 790,) running thence east on a random line between 29 and 32, and at 80.30 he met north and south line at a point 21 links north of corner to sections 28, 29, 32, and 33." Evidently that corner had also been "heretofore established;" and from it he went north 89.51 west on a true line, and at "40.15 set stone in mound for quarter-section corner." This is the south line of section 29, and along it he reports "lands abrupt, east slope; soil third rate; no timber, (margin 791.) He continued his survey west, between sections 30 and 31, to the Mount Diablo meridian, which he found at 84.46 chains, where he set a post for corner to sections 30 and 31, (margin 792.) On the next day he surveyed the line between sections 31 and 32, (margin 792 and 793,) and when he reached the corner on the base line to sections 31 and 32, he ran north 81.10 chains to corner of sections 29, 30, 31, and 32. From the corner to sections 32 and 33, in the base line, which of course had been "established heretofore," he surveyed part of the line between sections 32 and 33; at 40.53, north of the base line, he found "the quarter section corner, between sections 32 and 33, already established," (margin 793.)

Examining critically this return of his work, we find he surveyed the line between sections 29 and 30 one mile; that between sections 29 and 32 one mile; that between sections 30 and 31 one mile; that between 31 and 32 one mile; and on the east line of section 32, from the base line, one mile.

In this survey he was along only the southern and western lines of section 29—he was not on either the north or east line of that section—and he did not survey any line or mark any corner of the NE. ¼ sec. 29. His work was merely *supplementary to prior surveys.* His "general description" cannot be regarded as official beyond the survey he made, and his return does not in any manner embrace the NE. ¼ of sec. 29, or impeach the first and legal survey thereof in 1867.

The field notes of Partridge, certified from the Surveyor General's Office, contradict the certificate of Register Rollins in this, also, that his certificate covers six sections—19, 20, 29, 30, 31, and 32—when the field notes show that Partridge surveyed only *three* sections—30, 31, and 32—and a part of a fourth, the S. ½ of sec. 29.

On the diagram (Record, 192) exhibited by the evidence of McNee there is not any mine or mineral indications noted upon the NE. ¼ of sec. 29, although the "Welch mine" is located on the SE. ¼, and with this we see that the statements of witnesses coincide.

I take the liberty to say that the course of the executive officers in regard to this quarter section is difficult to understand. Certainly nothing short of the gross incompetency in some clerk can account for the statements in complainant's Exhibit D, p. 191, margin 797, dated General Land Office, March 14, 1874, particularly the statement that the NE. ¼ of Sec. 29, 1 N., 1 E., had been patented on 31st of May, 1870, but at that time the land in question had not been surveyed.

The register and receiver had certified (Record, 178) that the said lands "are *surveyed* public lands of the United States," prior to the patent, and it is by the surveyed description there given that the patent issued in May, 1870.

The evidence of McNee and Carter, (Record 113 and 114,) was given in the absence of McLaughlin's counsel, and is very inexact and not entirely accordant with the official re-

turns, and the subsequent statement of McNee when afterwards recalled, (p. 176.) I do not deem it necessary to say more than this, that the official returns themselves supersede the testimony of clerks concerning them.

We place before this Court now confident of its recognition of the justice of our position, the title of McLaughlin, delivered from all the denunciation that has been put upon it in the bill of complaint, and by the executive officers since the patent emanated.

It is a superficial, yet not unimportant remark, that the land laws applicable to the locality of this tract, and the theory of this case alike assume that there must be a line of demarkation between "mineral land" and non-mineral land, and that this line where the two kinds of land adjoin, *must be placed somewhere.*

As the field notes of Partridge return the S. ½ of sec. 29, as mineral land, we see that in *this particular case*, the executive officers of the United States, in the matter and duty of surveying public lands according to law, and the further matter and duty of patenting land under grants from Congress, have located this line of demarkation on the southern boundary of the tract in contest—north of that line is non-mineral—south of it is mineral land by the Government surveys.

Henry Beard

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Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 219.

THE WESTERN PACIFIC RAILROAD COMPANY
AND CHARLES McLAUGHLIN

vs.

THE UNITED STATES.

BRIEF

OF HENRY BEARD,
Attorney for Appellants.

JUDD & DETWEILER, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 219.

THE WESTERN PACIFIC RAILROAD COMPANY AND CHARLES McLAUGHLIN

vs.

THE UNITED STATES.

STATEMENT OF THE CASE.

This cause comes into this Court by appeal of the defendants below, from the decree rendered by the circuit court of the United States for the district of California, on the 20th day of June, 1878, in equity cause No. 1733, against them and in favor of the United States. (Decree on page 8 of printed Record. Appeal allowed, 196, and filed in this Court May 1, 1880.)

The bill of complaint was filed February 21, 1877, by the United States district attorney. *No direction or authority from the United States Attorney General* for the institution of the suit is set out in the pleadings.

I quote the most trenchant paragraphs in the complaint, as follows, (pp. 2, 3, 4):

To the honorable the judge of the circuit court of the United States for the ninth circuit, district of California.

John M. Coghlan, United States attorney in the district of California, on behalf of the United States of America,

brings this his bill of complaint against the Western Pacific Railroad Company, an incorporation organized within and under the laws of the State of California, and Charles McLaughlin, a resident of this district; therefore your orator complains, and says:

That by the several acts of Congress of the United States, approved July 1st, 1862, and amended July 2d, 1864, and March 3d, 1865, and by the joint resolution of 2d March, 1866, certain lands to be thereafter selected were to be granted to the said Western Pacific Railroad Company, provided said incorporation should complete a certain railroad and telegraph line in said several acts mentioned and described, and within the time and in the manner therein specified and set out, excluding and excepting from such grant all mineral lands embraced within the boundaries of said grant. That afterwards, to wit, on the 1st day of February, A. D. 1870, the commissioners, appointed for such purpose, filed with the Secretary of the Interior, at his office in the city of Washington, in the District of Columbia, United States of America, an official statement, representing therein that the said line of railroad and telegraph had been completed and equipped in the manner provided in the said several acts of Congress relative to the Western Pacific Railroad of California. That the said Western Pacific Railroad Company by its agent, Charles McLaughlin, on the 24th day of March, A. D. 1870, made and filed with the register and receiver of public lands, subject to sale at San Francisco, California, its original selection of lands within the proper circuits, (districts,) as provided in the said several acts of Congress. That among the lands so selected by the said Western Pacific Railroad Company was embraced the northeast quarter of section twenty-nine, in township one north, of range one east of Mount Diablo meridian, in the county of Contra Costa, in the State of California, containing one hundred and sixty acres of land. That thereafter said selection of lands were received at said land office, and was allowed by the register and receiver of the said land district of San Francisco, and return of said selections was there duly made by the said register and receiver to the General Land Office, at Washington, District of Columbia. That thereafter, to wit, on or about the 31st day of May, A. D. 1870, *United States letters patent in due form of law were issued to the said Western Pacific Railroad Company*, for the

said northeast quarter of section twenty-nine, in township No. one north, of range one east Mount Diablo meridian, and delivered to the said Western Pacific Railroad Company and came into the possession of the said Western Pacific Railroad Company.

And your orator further shows that the said parcel of land herein described and embraced in said letters patent granted, and hereinbefore described, was at the time the said Western Pacific Railroad Company selected the same, and applied for a patent for the same, and prior thereto, and ever since have been and now are mineral lands of the United States, containing *valuable quicksilver and cinnabar* deposits. That for more than ten years last past the said lands have been settled upon and occupied by persons engaged in mining in and upon the said land. That the mineral character of said lands has been well known during all the time it has been settled upon and occupied.

And your orator further shows that the map of the public survey of said lands was filed by the surveyor-general of the United States, in the office of the register and receiver for the district of San Francisco, on the 17th day of October, A. D. 1873, and that on said official map said lands are located as mineral lands.

Your orator further shows that by the terms of said letters patent all mineral lands are specially excepted and excluded from the operations of said letters patent.

Your orator further shows that the allowance of said selection by the said register and receiver and the return thereof to the General Land Office at Washington, District of Columbia, and the issue of said United States letters patent, and all the acts pertaining thereto and connected therewith, were done and performed unadvisedly and through inadvertence and mistake. * * *

And your orator further shows that the said Charles McLaughlin, at the time the said United States letters patent was transferred to him as aforesaid, then and there well knew and had notice that the land described in the said patent hereinbefore described was mineral lands of the United States occupied as aforesaid; that they were wholly unfit for cultivation and agricultural purposes, and were not and never had been subject to be granted under the provisions of the several acts of Congress, and that the said letters

patent had been unlawfully obtained by the Western Pacific Railroad Company, as aforesaid.

And your orator charges that by reason of the premises said United States letters patent, are illegal, fraudulent, and void; that they have and cast a cloud upon the title of the United States to said lands, and embarrass and obstruct the free and clear alienation of the same to bona fide purchasers.

And your orator prays that the same be adjudged and decreed to be null and void and wholly vacated, annulled, and set aside and cancelled and held for naught, and for such other and further relief as to your honor shall seem meet in the premises. * * *

To this bill McLaughlin filed his answer. He admitted the issuing of the patent as stated, and that he is now the owner of the land described in the bill, but denied that the said tract was ever mineral land. He also denied that the said tract was know as mineral land; denied that it had been occupied as mineral land, as alleged in the bill; denied the validity of the pretended surveys of said tract in 1873; denied that by the terms of the patent all mineral lands are exempted from the effect of the patent; and denied that the selection of the land "was allowed by the register and receiver" "through inadvertence or mistake;" and denied that "the issuing of the patent, or any of the acts pertaining thereto, was done or performed unadvisedly or through inadvertence or mistake."

He denied that he knew or had notice when he purchased the said quarter section, that the land was mineral land, and denied that the patent had been unlawfully obtained by the railroad company, and denied that the United States has any title whatever to the tract described, (p. 5.)

The United States filed replication to the answer, (p. 7.)

In the bill of complaint (p. 3) it is alleged that the quarter section in contest at the date of selection, and before and since, have been and are mineral lands, containing "*valuable quicksilver* and cinnabar deposits."

The replication (p. 7) also alleges that the "said land

contained *valuable deposits of quicksilver* rock in place, as well as cinnabar in surface earth."

The complaint alleges that the official map of the survey of the tract locates this as mineral land, and is dated in October, 1873. McLaughlin having answered that the tract had been surveyed long prior to the patent, and that the survey of 1873 was made long after the official survey, (record, p. 5,) the replication (p. 7) reiterates the allegation that there was no legal survey of said land until about the year 1873.

There are other allegations and denials. I have selected those that appear to present the controversy squarely as it stands to-day.

The court below entered the following decree, (p. 8):

At a stated term of the circuit court of the United States of America for the district of California, held at the court-room, in the city of San Francisco, on Thursday, the twentieth day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the honorable Lorenzo Sawyer, circuit judge.

THE UNITED STATES *vs.* THE WESTERN PACIFIC RAILROAD COMPANY, and Charles McLaughlin.	In equity. No. 1733.

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz: That the land described in the bill of complaint filed herein, and being part of the land mentioned in the letters patent issued on or about the 31st day of May, A. D. 1870, by the United States to the defendant, the said Western Pacific Railroad Company, the title to which land was afterwards, by several mesne conveyances, vested in the said defendant, Charles McLaughlin, being that certain tract of land described as follows, to wit: The northeast quarter of section twenty-nine, in township number one, north of range number one east, of Mount Diablo base and meri-

dian, in the county of Contra Costa, California, containing one hundred and sixty acres of land, were mineral lands within the meaning of the acts of Congress referred to in the bill of complaint, and not subject to entry by said Western Pacific Railroad Company, and said letters patent, which are fully described in the bill herein now on file in this cause, were issued by mistake and without authority of law as to the lands in the bill of complaint and in this decree described, and that said letters patent as to said land herein mentioned, and only as to said land be adjudged and decreed to be null and void, and that the same be to that extent set aside, cancelled, and held for naught, and that the grantee and all others deriving title to said land hereinbefore described under said letters patent take nothing by reason thereof.

And it is further ordered, adjudged, and decreed that the defendants pay to the complainant, the United States, his costs in this suit as taxed, amounting to the sum of three hundred and twenty-three dollars and seventy cents.

(Signed) LORENZO SAWYER,
Circuit Judge.

The very distinguished judge who rendered the decree has filed no opinion in the case.

It was provided by stipulation that the patent issued by the United States to the defendant railroad company, 31st May, 1870, might be filed in evidence, Record, p. 11, also p. 179, but we do not find any copy thereof in the record.

It is admitted that a certificate in the following form is issued by the register and receiver upon the admission of selections of railroad lands, (p. 178,) by the Western Pacific Railroad Company.

UNITED STATES LAND OFFICE, 18—.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the under selection by , the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is

allowed and approved, and that the whole of said lands are *surveyed public lands of the United States*, and within the limit of miles on each side; and that the same are not, nor is *any part thereof, returned and denominated as mineral land or lands*, nor claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to as allowed by the act of Congress, approved July 1st, 1864, and contemplated by the circular of instructions, dated January 24th, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices; and that the said company have paid to the undersigned, the receiver, the full sum of , in full payment and discharge of said fees.

Register.
Receiver.

As the letters-patent are stated in the bill to have been issued "in due form" of law, it is thereby conceded that the customary forms were observed by the local officers, the General Land Office, and the Secretary of the Interior, in issuing said patent, which, as stated in the petition, is dated 31 May, 1870.

The circular of the General Land Office under which the tract now in controversy was selected is believed to have been that of Jan. 24th, 1867.

(2d Lester's Land Laws, Regulations and Decisions, p. 362.)

I call attention to the 8th and 9th paragraphs of these instructions, as follows, pp. 363, 364:

"8th. Herewith is a form of title-page to be prefixed to the Lists of Selection.

"Let me here call your special attention to the necessity of *great care* in the examination and testing of these lists, so that all conflicts may be avoided and improper selections be excluded, and that the verified schedules may be absolutely accurate, thus avoiding embarrassment and delay to all concerned.

"9th. Pacific Railroad act, July 2, 1864.—It is provided in

section 4 that the word 'mineral,' when it occurs in that act, shall not be held to include iron and coal. Therefore, iron and coal lands are subject to selection by the Pacific railroads; but all other minerals are expressly excluded from the grant, and must necessarily be so from all selections you may certify to this office. When the verified lists are received at the General Land Office, prepared and certified as above required, such definitive action as the law requires will be here taken, with a view to invest the grantee with a complete title." * * *

It is conceded by the appellants that "all mineral lands" are excepted from this operation of the grant under which the patent issued to the defendant railroad company, but the term "mineral lands" must "not be construed to include coal and iron land." (Sec. 3, act July 1, 1862, 12 Stat., 492; and Sec. 4, act July 2, 1864, 13 Stat., 358.) But they claim that the proper officers of the United States had made the intelligent decision that the said land was subject to the said grant, and that it was not mineral land, before and at the time that the said patent was issued.

The testimony was taken at San Francisco before an examiner in chancery. Seventeen witnesses were examined on behalf of the United States, (Record, p. 12,) beginning June 27, 1877. Two of the witnesses for the Government were recalled; and seven additional witnesses sworn for the defence, p. 115. In the testimony much that is relevant is repetition, and intermingled with much unimportant and some difficult to interpret.

The land is worth 6000 Record p 196.

ASSIGNMENT OF ERRORS IN THE DECREE OF THE U. S. CIRCUIT COURT.

1. The appellant, McLaughlin, excepts to the finding and judgment of the said circuit court—because it does not appear in the pleadings or decree that the United States, by its Attorney General, authorized the filing of the bill in this cause.

2. The appellant, McLaughlin, excepts to the finding of the court that the 160 acres of land in the bill described were "mineral lands" within the meaning of the acts of Congress mentioned in said complaint, and claims that the evidence before the court was and is insufficient to sustain the conclusion.

3. The said appellant excepts to the finding that the patent to the defendant railroad company therefor was issued by mistake and without authority of law.

In support of the first exception above, I respectfully refer to the case of the United States *vs.* Throckmorton, 98 U. S. Repts., p. 61, from which the subjoined quotation is made, remarking here that there is not found any such important principle or valuable property at stake in this case, as I would suppose would be requisite to induce the United States to have recourse to the courts to set aside its own conveyance.

On page 70 of 98 U. S. Repts., I find the following:

"We are of opinion that, unless by virtue of an act of Congress, no one but the Attorney-General, or some one authorized to use his name, can bring a suit to set aside a patent issued by the United States, or a judgment rendered in its courts on which such a patent is founded.

"That is the case before us, and we see nothing in the bill to indicate to the court that it ever received the sanction of the Attorney-General, or was brought by his direction. The allegation already cited implies that Mr. Van Dyke, the district attorney, is the complainant; but if, construing it liberally, we hold that the United States is the complainant, the statement is clear that the bill was brought by the district attorney, and not by the Attorney-General. Leaving out of consideration all mere questions of form, there arises no presumption from the act of Congress which gives the Department of Justice a general supervision over the district attorneys, that this suit was brought by his direction; for they, in the strict line of their duty, bring innumerable suits, indictments, and prosecutions, in which

the United States is plaintiff, without consulting him. In the class of cases to which this belongs, however, the practice of the English and the American courts has been to require the name of the Attorney-General as indorsing the suit before it will be entertained. The reason of this is obvious; namely, that in so important a matter as impeaching the grants of the government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit. He should, also, have control of it in every stage, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill."

Remarks relative to statutory provisions and definitions of the "mineral lands."

The case at bar appears to the undersigned to be one of much interest and importance. It involves the question "What are "mineral lands"—what is the meaning and interpretation of those two words, "mineral lands," as found in the United States land laws?

The lands in controversy are alleged by the pleader in the petition to be "mineral lands," because "containing valuable quicksilver and cinnabar deposits," Record, p. 3; and in the replication he says, "said land contained valuable deposit of quicksilver in rock in place, as well as cinnabar in surface earth."

We accept this as correctly defining mineral lands. The deposits of the precious metal must be *valuable*, and here there is but one standard of value practicable. Mineral lands must contain ores sufficiently rich in quality, and affluent in quantity, to yield a moderate return to labor and capital employed in working them. If they will not do this they are not *valuable* as mineral lands.

The patent having issued May 31, 1870, the question and case seem specially referable to that date; but no objection has been made to the consideration of the testimony of wit-

nesses whose examinations of the land and acquaintance with it have been subsequent to that date.

By the act of Congress of March 3, 1853, regulating the survey of public lands in California, section 3, (10 Stat., 245,) it is—

"Provided that none other than township lines shall be surveyed when the lands are *mineral* or are deemed unfit for cultivation, and no allowance shall be made for such lines as are not actually run and marked in the field and were actually necessary to be run."

This was the law of the locality when the first subdivisional survey was made in the township, and when the patent issued under which McLaughlin holds title, and it remained in force until July 9, 1870, when repealed by the act of that date, (16 Stat., 217, sec. 16,) as follows:

SEC. 16. *And be it further enacted*, That so much of the act of March third, eighteen hundred and fifty-three, entitled "An act to provide for the survey of the public lands in California, the granting of preëmption rights, and for other purposes," as provides that none other than township lines shall be surveyed where the lands are mineral, is hereby repealed. And the public surveys are hereby extended over all such lands: *Provided*, That all subdividing of surveyed lands into lots less than one hundred and sixty acres may be done by county and local surveyors at the expense of the claimants: *And provided further*, That nothing herein contained shall require the survey of waste or useless lands.

Therefore, when said patent issued, it was unlawful to survey the quarter-section in controversy if it was "mineral land."

"All mineral lands" were excepted "from the operation" of the grants to the railroad company in 1862 and 1864. They were likewise excepted from the operation of the various grants to the State of California in the act March 3, 1853, and from preëmption rights, as well as withdrawn

from subdivisional survey by the surveying officers. (10 Stat., 244.)

In 1866 Congress (14 Stat., 251,) enacted what this Court has called "a complete system for the sale and other regulation of its mineral lands."

Mining Co. *vs.* Consolidated Mining Co., 102 U. S. Rep., at p. 174.

Sections one and two of the act are as follows:

Be it enacted, &c., That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

SEC. 2. *And be it further enacted*, That whenever any person, or association of persons, claim a vien or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

The inquiry is suggested whether by that law the line of demarkation between the mineral and non-mineral lands was fixed for the time being. If yea, then the mineral

lands that could be sold under that act were lands containing "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper," * * * "improved according to the local customs or rules of miners," &c. Here is something explicit. It describes veins or lodes of ores capable of improvement and use as mines. If this law designated the "mineral lands," so long as it remained in force, and unchanged, then I claim that the evidence in the case shows that the land in contest was not mineral land, because it shows affirmatively that there is not any vein or lode of the precious metals to be found upon it.

But if another view be taken; if this act of 1866 *did not define the mineral lands* while it was in force unaltered, but only provided for the sale of a certain class of them, then we are carried along to the further legislation of July 9, 1870, sec. 12, (16 Stat., 217,) providing for the sale of "Placer claims," as mineral lands, and to the act of May 10, 1872, (17 Stat., p. 91,) which does contain a definition, and is as follows:

Be it enacted, &c., That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

This section is referred to as the foundation of paragraph 2318 of the Revised Statutes, as follows:

"Sec. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise directed by law."

Both these enactments were prior to the institution of this suit, and such being the case, it is clear that the United

States cannot recover in this case without affirmative proof that the land in contest is "*valuable for minerals.*"

Further Propositions for Argument.

2d. I propose to show from the record, that the quarter section in controversy was in the regular and proper administration of the land laws by the executive officers, ascertained to be non-mineral land, as such had been regularly surveyed and returned, and was patented on the 31st of May, 1870, to the said railroad company, and that this quarter section of land was never surveyed and returned as mineral land, at least that the evidence in the case shows but one survey, and by that survey there was a return of the land without any designation of minerals.

3d. I claim that the burden of proof is upon the appellee, complainant below, and that the evidence submitted by the complainant, even without considering that of the defendant, fails to show the land to be valuable for cinnabar, as alleged in the complaint.

The record discloses an attempt by the complainant to discredit the original survey of the northeast quarter of section twenty-nine, township one north, range one east, and to exhibit a *subsequent survey of adjoining land as the authentic survey of this land.*

A copy of a letter of the Commissioner of the Land Office, dated March 14, 1874, was offered in evidence by the United States *and objected to*, (Record, 113, margin 470,) annexed to the testimony, and marked Exhibit D. (Record, p. 191.)

This was introduced for the purpose of showing that the NE. ¼ of Sec. 29 had not been surveyed prior to the issuing of the patent, and that the true plat of the township had been filed with the register, October 17, 1873. The testimony of witness NcNee, (p. 113, margin 472,) tended to show

that the last map filed, October 17, '73, had returned this quarter section as mineral land. The same witness recalled (Record, 177, margin 744, 745, 746, 747, and Record 178, margin 748 and 749) gives an explanation in detail, which corresponds with the true state of facts. He says the plat of survey of the township was filed with the register July 19, 1867, that that map showed the N. ½ of the NW. ¼ of Sec. 29, and thereon the figures "80," also the NE. ¼ of the section and the figures "160," which figures denote the area of the said tracts, and there was "*no writing upon it*," that is, on the NE. ¼, that there was no mark or indication that the quarter was mineral land; but upon the N. ½ of Sec. 30 there was the word "cinnabar."

The United States also introduced the field notes of the subdivisional surveys made by John C. Partridge, January 14 and 15, 1873, which the attorney for the complainant called "putting in," "in regular form, the field notes of the last survey," and which field notes are on pp. 187, 188, 189, of the printed record.

All this evidence is inadmissible for the purpose of impeaching the "letters patent, issued in due form of law," on the 31st May, 1870, because with the issuing of that patent, and whilst it remained uncanceled by judicial decree, the executive authority over the land had terminated.

Moore *vs.* Robbins, 96 U. S., 530.

It has also been decided by this court that a second survey of land, after the United has parted with the title, is inoperative to affect the title conveyed by the patent. The Government was bound by the original survey. (Lindsey *vs.* Hawes, 2 Black, 560; also, R. R. Co. *vs.* Shurmier, 7 Wallace, 273, at middle of p. 289.)

The pleadings allege the regular issuing of the patent in due form of law; and the proceedings under the railroad grant, and prior to the patent, embrace a recital that the

lands are duly surveyed, and not returned or denominated as mineral lands. (Record, 178, margin 751.)

Perhaps it is unnecessary, but I have very carefully sifted and compared what appears in the testimony concerning the survey of the tract in controversy, and shown, as I believe, in the latter portion of this brief, that the northeast quarter of section 29, township 1 north, range 1 east, was regularly surveyed and returned as non-mineral; and that the survey by Patridge in 1873, and his field-notes and return, do not embrace or relate to the northeast quarter of section 29, but only to those parts of that section, and to sections 30, 31, and 32, that had not been surveyed in 1867, because regarded as "unfit for cultivation," and having "indications of cinnabar," and consequently not liable to be surveyed in 1867.

III.

3d. Coming now to my 3d proposition, I remark that the patent for the northeast quarter of section 29, having issued in "due form of law," after the regular survey and due examination of the tract determining that it was of the description of land granted by Congress to the railroad company, the affirmative propositions of the bill in this cause must be satisfactorily supported by the evidence, otherwise the bill must be dismissed.

The bill describes the land as "containing *valuable* quicksilver and cinnabar deposits." The replication says, "said land contained *valuable* deposit of quicksilver in rock in place, as well as cinnabar in surface earth."

It is not every trifling deposit of ore that will make a tract of land "mineral land."

This remark is sustained by a recent decision of the supreme court of Nevada, at the October term, 1880, made since the decree in case at bar was entered in the United States circuit court for the 9th circuit.

(15th Nevada State Reports, 405, Merrill *vs.* Dixon *et al.*)

The action was brought to recover 398 cords of wood that had been cut in 1877 from the west half of section 9, township 21 north, range 19 east, for the Poe Mining Company, and sold to plaintiff by the sheriff as the property of said mining company.

The defendants claimed the wood, as owners of the land, under a conveyance from the Central Pacific Railroad Company, and it was conceded that the land belonged to said railroad company at the time the wood was cut, unless it was mineral land, and as such excepted from the railroad grant of 1862 and 1864.

The map of the Government surveys was offered in evidence to show that the land was mineral land. Objected to, and the objection sustained. I quote the language of the court:

"For the purposes of this case, we shall consider that all mineral lands which were intended by Congress to be excluded and excepted from the operation of the grant to the railroad company, were excluded and excepted by the patent conveying the lands to the said company upon which this wood was cut. And, although we are strongly impressed with the idea that the plaintiff's relation to the title is not such as to allow him to question the validity and efficacy of the patent (Dall. v. Meader, 16 Cal. 324), still, it being unnecessary, that subject will not be considered.

"Counsel for plaintiff says in his brief, that the reason why the testimony of Barker was offered, was 'to show that the land on which the wood was cut had been returned and denominated mineral lands.' But suppose it was so returned and denominated?

"That fact would not tend to show that the land was such mineral land as was excepted and excluded by the grant. The text of the act of 1864, as it appears in 13 Statutes at Large, at page 358, is as follows: 'And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation, or mineral lands, or the improvements of any *bona fide* settler, or (on) any lands returned and denominated as mineral lands. * * * The word "or," last used in the sentence quoted, should read "on." (See 2 Lester's Land Laws, 123.) So the statute should read as follows:

"'And any lands granted by this act * * * shall not * * * include * * * any mineral lands, or the improvements of any *bona fide* settler on any lands returned and denominated as mineral lands.'

"The witness, Barker, did not pretend to know anything about the lands embraced in section 9. He did not know whether they were at all valuable for mining purposes. He simply knew they were returned and denominated upon the map as 'copper, gold, and silver-bearing quartz.'

"After the company's patent from the Government was admitted in evi-

dence, the burden of proof was upon plaintiff to show, admitting he was in situation to demand the right to do so, that the tract described therein was, in fact, such mineral land, that it was excepted from the operation of the grant and by the terms of the patent. Neither the map nor the testimony of Barker, tend to show that fact. It can only be claimed that the map showed, *prima facie*, that there was, upon the section, 'copper, gold, and silver-bearing quartz'; but it did not tend to show whether it was there in quantity or quality sufficient to make the land valuable for mining purposes, and if that was not shown, proof of the *prima facie* fact just mentioned did not tend to show such mineral lands as are excluded from the grant.

"In excluding mineral lands, Congress only intended to exclude lands valuable for mining purposes. It is only valuable mineral lands and deposits that are reserved from sale, except as provided by law, in respect to mineral lands. (See U. S. Rev. Stats., secs. 2318, 2319.)"

In Alford *vs.* Barnum, 45 Cal., 484, the court said:

"But it is contended by the defendant that the land in controversy was 'mineral land,' and so within the reservation of the act of Congress of July 1, 1862, and July 2, 1864, by which public lands were granted to the railroad company, and within the exceptions and reservations of the patent which, in this respect, follows the terms of the grant. * * *

"The mere fact that portions of the land contained particles of gold, or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land within the meaning of the acts referred to. It must at least be shown that the land contains metals in quantities sufficient to render it available for mining purposes. Any narrower construction would operate to reserve from the uses of agriculture large tracts of land which are practically useless for any other purpose, and we cannot think this was the intention of Congress.

* * * * * * * * *

"It is well known that it is the constant practice of the Land Department to allow lands returned, denominated, and claimed as mineral lands to be purchased as agricultural lands upon satisfactory proof that they are not valuable for mining purposes.

"The judgment and order appealed from are affirmed."

On examination we find that the proof fails to establish the allegation that the land was and is mineral land.

It shows that there is no vein, lode, or ledge of cinnabar on this quarter section.

Joshua Marsh, witness for complainant, on cross-examination, questions 55 and 56, Record, p. 16, testifies:

Question 55. Has there been any ledge found on this land?

Answer. No, sir; I think there hasn't been any ledge found on the land. The richest they ever have got is in the dirt. Some is in the rock part of it.

Answer. It runs east and west—northwest and southeast about, is the nearest you can get to it.

Wm. Mulligan, Record 143, margin 596, says he saw no re[de]fined ledge—would not call the Welch Consolidated a ledge.

T. J. Crandell, for defendant, p. 148, testified:

Question 11. With regard to the ledge that they have got on the Welch mine—have you ever worked on that ledge?

Answer. I have—very little, though on the ledge. I worked outside mostly when I worked there at the mine.

Question 12. How far is that ledge from the Powell claim?

Answer. Well, the line runs—how far is the ledge?

Question 13. Yes, sir.

Answer. I don't know exactly. It must be four or five hundred feet to the ledge—that is, what they call the ledge.

Question 14. Is Powell's down hill or up hill from this ledge?

Answer. Powell's is down hill from this ledge for a ways, and then it is up hill. It is down hill until you pass the reduction works.

Question 15. Do you know where the gulch is?

Answer. Yes, sir.

Question 16. Is that gulch down hill from the ledge?

Answer. That gulch is down hill from the ledge, sir.

Question 17. Can rocks and boulders be carried from that hill down to that gulch by rains and floods?

Answer. Very easily, sir.

Question 18. Are there a number of boulders that have been carried by rains and storms down the hill?

Answer. Yes, sir.

Question 19. Have you examined them with reference to that subject at different times?

Answer. I have; I have never seen them rolling down, but I have seen that they were boulders, and that they must have come down that way.

Mr. Richard Taylor, a comparative stranger to the locality, is, I believe, the only witness who says that he saw

indications of a "vein," and that ore which he found on the surface indicated the existence of a vein. (Record, pp. 50 and 51, margin, 201–202.) But he appears to be speaking generally of the region about the Welch mine. He says that the surface ore would yield two or three per cent. of cinnabar, and that ore yielding three per cent. will, in his opinion, "pay" to reduce it, (p. 51.)

This witness said he had been sent up there to examine the Welch mine and several other places, by Mr. Parrott, Mr. Tom Bell, and others. But Mr. Bell was called by the defendant, and denied knowing Taylor and denied having employed him to examine quicksilver mines. (Record, 176.)

The proof, therefore, shows that there is no known vein, lode or ledge of cinnabar on this quarter section, and that there are no indications of one.

But there is some cinnabar ore there; and the question arises: Is this good mining ground?

Thomas Priaulx, for complainant, Record, p. 23, testifies:

Question 28. Did you ever see on this land any ledge?

Answer. No, sir; not that I know of.

Question 29. The quicksilver that you found, was it in the soil or in the rocks?

Answer. In the rocks, and some in the soil, too.

* * * * *

Question 32. What you say you saw that you called quicksilver rock, didn't it look as if it had been broken off from somewhere? I am, of course, only asking for your opinion; you cannot tell whether it was or was not. Did it appear to have been, or not?

Answer. I should judge it would been.

Question 33. How much of that rock did you see on this land?

Answer. I should judge about three or four ton.

Question 34. Where, on this land?

Answer. Yes, sir.

Jonathan Donner, for complainant, said he knew the quarter section in controversy. (Record, p. 28.)

Question 56. Has there been any cinnabar ledge found anywhere there?

Answer. They say they have got a ledge at the Welch mine, but I don't know of any.

J. H. Welch, from whom the Welch mine on the SE. ¼ of sec. 29 was named, Record, p. 37, says:

Question 105. Did you ever trace a quicksilver ledge, or see one?

Answer. Yes, sir.

Question 106. Where?

Answer. Up there.

Question 107. A quicksilver ledge up there?

Answer. What we took to be a ledge; yes, sir.

Question 108. Can you tell what a ledge is?

Answer. A ledge is rock in place, I suppose; rock that is together, not thrown about; that is what I understand by a ledge.

Question 109. On this land in question here have you found any quicksilver ledge?

Answer. No, sir.

Mr. WISE, p. 47:

Question 266. When, Mr. Welch, did you ever find any quicksilver in any place where you had got entirely clear of the dirt, and it was in the rock? Did you ever?

Answer. Oh, yes, sir.

Question 267. On this land?

Answer. Not on that land; no, sir.

Question 268. Whenever you found quicksilver on this land it was rock, and earth, and quicksilver, and other things mixed?

Answer. Yes, sir.

J. L. Shannon, for the United States, Record, 71:

Question 128. What you saw and took to be cinnabar, was it in dirt, or clay, or rock, or was it in all three, or how was it?

Answer. All three, sir.

Question 129. Did you see any ledge?

Answer. I didn't see any ledge of quicksilver rock—what I would term a ledge.

Isaac T. Sherman, p. 77, in answer to question 57, said he did not see anywhere on the 160 acres anything that looked like a real ledge.

C. A. Bramlet, for the United States, was uncertain as to the exact place at which he found some ore, but replied as follows, p. 109:

Question 89. What did you take it out of?
Answer. I took it out of the boulder.
Question 90. You saw nothing but a boulder?
Answer. I saw several.
Question 91. You did not see any ledge?
Answer. No, I did not.

Jacob Bendixen, for defendant, p. 118, testified:

Question 37. Is there any ledge on this land in controversy?
Answer. Not to my knowledge, sir.
Question 38. Have you made a thorough examination of the quarter section?
Answer. I think I have, sir.
Question 39. Did you ever find any trace of a ledge on that quarter section?
Answer. I did not, sir.

Same witness, on cross-examination, p. 132:

Question 270. You say there is no ledge, to your knowledge, upon that ground?
Answer. There ain't, sir.
Question 271. The Welch Consolidated Quicksilver ledge ends how near that ground where you have prospected it?
Answer. I could not tell; we never was deep enough by a good many hundred feet to tell.
Question 272. How far from this piece of ground did you strike that ledge?
Answer. Well, I suppose about—well, in some places the cropping all came to the line within a hundred yards, and probably in other places it wouldn't come near so close.
Question 273. What is the main direction of that ledge, north and south?

Question 10. Does the land contain mineral?
Answer. Yes, sir.
Question 11. What mineral?
Answer. Cinnabar.
Question 12. Have you worked upon the land?
Answer. No, sir.
Question 13. Upon what portion of the land have you seen that cinnabar?
Answer. Well, I seen it pretty much all over it in different places, particularly on the southern portion of it.
Question 14. State whether you have seen and examined the rock in an open cut in that place?
Answer. Yes, sir; I have.
Question 15. Describe that open cut and what it contains?
Answer. Well, it contains rock and dirt.
Question 16. Well, as to cinnabar?
Answer. The dirt contains cinnabar. It has been taken out of that, and the rock contains cinnabar that comes from this open cut.

At pp. 29 and 30, margin 113, 114, this witness says he has prospected over the surface of the quarter section in question, and found cinnabar. Took out over one pound. He found it in "loose rocks and dirt." Prospected with a pan. (Margin 117.)

J. H. Welch, on cross-examination this (p. 40:)

Question 148. How do you find the mineral?
Answer. Well, in the rocks; some big ones and some little ones, and some dirt. Where you do not find rock, if the ground looks favorable, you take a pan and pan it.
Question 149. You mean to say that almost all over this quarter section you can find some traces of metal?
Answer. Yes, sir.
Question 150. Did you ever find any metal in any quantities on this quarter section that would pay for working?
Answer. Yes, sir, some. I think it would pay. I don't know as it would.
Question 154. All over this quarter section, and all around

the neigborhood there, there are a great many little prospecting holes dug, are there not?

Answer. Yes; a good many.

Question 155. Most of them have been abandoned, have they not?

Answer. Yes, sir; a great many of them have been abandoned.

Question 156. When did they first commence prospecting for metals in that section of the country?

Answer. I don't know exactly; it was a good while ago, though.

Question 157. When, as near as you can remember?

Answer. It must have been before 1860, anyhow, or about 1860, I should think.

Question. And they have been prospecting there ever since; digging little holes and leaving them?

Answer. Little holes and big holes.

John Grummett was called by complainant, but on cross-examination said he first examined the lands about two years ago, (record, p. 85:)

Question 60. Did you discover anywhere upon this land any mineral ledge?

Answer. No, sir.

Question 61. All you saw was these little pieces of rock and this earth and clay that you think contained quicksilver?

Answer. The large rock was in this cut; the small rock was in different places over the land.

John Donner, Sr., (record, 90,) a few days before he testified had taken some ore that he had obtained from the land by panning to Mr. Strong to be assayed. (Mr. Strong (p. 96) testified that the ore presented by Mr. Donner had assayed 6.8 per cent. of quicksilver.

C. A. Bramlet, (p. 105, margin 437,) selected a piece a little larger than a hen's egg, and obtained a lady's thimble full of quicksilver.

For defendant, *Mr. T. J. Crandell*, testified (record, p. 149, margin 624,) that the working of the Welch mine, on

the southeast quarter of section 29, had been unprofitable. He says that the only place where he saw cinnabar, on the northeast quarter, was on "the cut," there he saw a large boulder, but the quantity of ore in the rock amounted to nothing.

J. W. Strickler, for defendant, examined that locality, and the Welsh mine. He says, (p. 158, 159:)

I found it situated on the side of Mount Diablo—the north side—where the base of the mountain seems to rise very abruptly from the surface, and this is on the edge of the base of the mountain, some—I would guess—one hundred and fifty feet above the level of a ravine, below, or north of the Welch mine, on which reduction-works are situated, and which reduction-works are situated on the northeast quarter of section 29, the claim in question, and where, from all appearances, all of the ores that have from time to time been worked by the various companies attempting to work the Welsh Consolidated (so-called) quicksilver mine have reduced all their ores, and where they take all these ores to, from the southeast quarter, or Welsh mine, to reduce them; the furnace and reduction-works being on the so-called Powell claim, that being situated at the bottom of the ravine, in a little flat containing some two or more acres of flat land, or not flat, but with a gradual descent; thence down to the eastern line of the northeast quarter of the said section 29, the claim in question. The ravine, I believe, runs there. If I mistake not, all of the ravine passes through the Powell claim; and all of the cinnabar that is in that ravine seems to have come there from these reduction-works, or from the hillside north (south) of it, the mountain side, on which the Welsh Consolidated quicksilver mine is situated. It seems so, for having examined the northern side of the ravine, on which the bulk of the Powell claim, so called, or the claim in question, is situated, I find no evidences of cinnabar whatsoever. Across the hill, north of the Welsh Quicksilver Mining Company's reduction-works, a little east of north there is a tunnel run twenty-one paces into the hill through the rock. I saw some cinnabar. Mr. Mulligan examined that with me; we placed it—measured it. I saw some cinnabar at the mouth of that tunnel that evidently was carried there from some other point, there being no

seam visible in the tunnel, which was run by Mr. Oglesby, it is said. Of my own knowledge, I don't know who run it; but at any rate the tunnel was there, and there was no visible evidence of quicksilver in that tunnel that I could find. I saw some quicksilver boulders—rock in a ravine on the northern side of this claim, where, in 1866, I think, Widow Rogers lived, on this same quarter section, the quarter section in question; I saw some quicksilver boulders in that ravine that looked to me as though they had been packed there. They had been broken off—had been mined; and there is no hole, no place dug out on the surface from which they could have been taken visible to me. And I examined with a view of determining for myself whether or not that was a quicksilver-bearing quartz section, and I saw there those boulders. Otherwise I have seen no evidence whatever of quicksilver on that land.

Question 11. The ledge on the Welsh quicksilver mine, what kind of a ledge is it?

(OBJ.—Objected to as immaterial.)

Answer. Well, Mount Diablo seems to be a solid mass of rock. Of course here and there there is a little piece of earth. It is a kind of blue sandstone; that is, there is some sandstone in it. It seems to be a primitive rock, some portions of it. It is a conglomerate, so called, at least I have been so taught to call it—a conglomerate mass; and in this rock we find little seams of quicksilver. We found boulders at the base of this mountain, on the *southeast* quarter of section 29, immediately south of and adjoining the claim in question, and about four hundred yards, I should say, from the southern line of the claim in question we found large boulders of sandstone and conglomerate rock—a kind of blue shaly rock, interspered with quicksilver—I mean cinnabar. Some of it is quite rich in spots, and some of it is not rich. Some of looks as if it was limestone, and I think there is some limestone mixed in with it, and that seems to be the character of the rock. There is some shale—considerable shale there. What is called shale, a rock of a slaty nature.

This witness says, (p. 160,) that he examined all the holes he could find, and the tunnels on the NE. ¼ of section 29,

and found no such evidences of cinnabar as he had observed on the SE. quarter.

It is shown by the testimony of Phillips and Bendixen for defendant that all the quicksilver mining in that vicinity has been unprofitable. Three times the Welsh mine on the SE. ¼ of section 29 has started in the last twenty years, and three times it has shut down.

Not only the Welsh mine, but the cut and tunnel on the Powell claim were, at the time of taking the testimony, in an abandoned and deteriorated condition, with no prospect of recovery. The tunnel was the work of Oglesby, and not of Powell, done some years ago.

The witnesses all agree in stating that the rocky boulders containing cinnabar ore are found in the ravines or gulches, the places they would naturally find if they had, in remote ages, been separated from the mass of Mount Diablo, which overshadows this land, rising from it 3,000 feet in three miles, with a continuous ascent.

If I can understand the record, the complainant's witnesses, except G. W. Strong, testified between June 26 and July 7, 1877. (Record, pp. 12 and 114.)

The defendant's witnesses testified, beginning August 16 and ending October 9, 1877. The depositions of both parties, before that time taken, were filed in court October 9, 1877. Record, 115, margin 479; and 187, margin 788.

On page 178, margin 750, we find the date October 31, 1877, which date appears to be that of the recall of R. F. Knox and of the deposition of G. W. Strong, but whether that be true or not, it appears, from Mr. Strong's testimony, that he examined the land in contest in the latter part of August, 1877, after the testimony had been given by the other witnesses for the complainant, and after the principal witnesses for defendant, Bendixen, Mulligan, Crandell, and Strickler, had testified, August 16, 1877.

G. W. Strong testified in rebuttal for the United States,

and, on an examination, his testimony is evidently adapted, if not intended, to fill up a palpable deficiency in the evidence in the case when the complainant's evidence was first closed.

Late in August he examined the Powell claim.

He says, p. 181:

Answer. We found a place which is called the Powell mine. It is known by that name there. We found cinnabar there. We dug down in the hard rock, and put in blasts and blew it out, and found good rich rock.

Question 12. Was that upon the surface of the ground?

Answer. No, it was in a cut. It was in the cut along the south line. * * *

Question 16. How deep is that cut at the end of the cut next to the bank?

Answer. Well it is—I could not say how many feet, but it seemed to have been filled up some.

Question 17. Fifteen or twenty feet?

Answer. It possibly has been that much, but I could not say positively now. It is sloughed in; filled in along down the middle. Where I dug down and put in the blasts it was very solid, and to considerable depth. I cannot say how many feet, probably 10 or 12 feet; something that way.

Question 23. What per cent. would you judge the rock to be?

Answer. Well, I should say it was from 3 to 10; somewhere along there. Of course I could not state exactly. It seemed to be a rich deposit there.

Question 24. State whether there was any appearance of that having been a slide from the mountain.

Answer. Well, I examined as to that matter. I did not consider it to be a slide. I thought it was fixed there. It was not a slide.

Referring to the diagram X, found on p. 193, the witness says, p. 183:

Question 55. Look at this diagram marked "X." State whether that is a fair diagram of the mine as you saw it.

Answer. It is not a correct diagram of anything particularly, but it is approximating to it, I might say. His house is here (showing), and barn, as I saw it; this creek passing down between there and the county road passing down there. I know by this that I was on that ground there.

The effect of this statement is to cause us to doubt whether the witness really knew the locality of the land in controversy, and the relations of lines and objects to each other. It is certain that the diagram does not truly represent the section lines of the United States surveys.

If that map was used to show him where to go, or to help him find the land or the Powell house and the Welch mine, then he must have gone wrong.

This witness is also confronted by his own history. He has been a metallurgist and assayer twenty-one years; has handled cinnabar ores twelve years; has been living in San Francisco, only thirty miles or so distant, and he comes up to Mount Diablo in the end of August, 1877, for the first time, though, as Welch says, Record p. 40, the region had attracted attention as far back as in 1860, when it was first prospected.

Though the United States has called seventeen witnesses, some of whom have been prospecting in this region ten to fifteen years and more, and some have known it twenty years, no evidence has been given of any productive mining on this land, and the mining at the Welch mine, upon richer and larger cinnabar deposits on the southeast quarter of the section, has not been profitable.

The witnesses do not know of any profitable mining having been done on this quarter section, and are in doubt whether the more massive and richer rock found on the Welch claim has ever been, or can ever be, profitably worked.

J. Marsh (Record p. 30, Ques. 61) is not able to say that

any profitable mining has ever been done in the Mount Diablo mining district.

One William Ryder Powell is mentioned by nearly all the witnesses as being upon this land. It is called *the Powell claim.* Several witnesses say they were summoned or requested to attend by Powell, to give their testimony in behalf of complainant before the examiner.

Let us, therefore, investigate Dr. Wm. Ryder Powell, the bonanza king, that the United States shows to us, in the testimony in this case, as the man who has occupied and used this place for quicksilver mining.

Joshua Marsh, p. 14, for the United States:

Question 26. Mr. Marsh, is the land occupied or unoccupied?

Answer. Dr. Ryder Powell has been occupying it; I saw him there a good many times.

Question 27. How long has Dr. Ryder Powell occupied that land?

Answer. According to the best of my knowledge, since 1866.

Cross-examination, Record, 15:

Answer. No; there is no farming on my land; and on this of Dr. Powell's there is about five acres that he farms a little, that is, by raising hay, a little grain for hay—about five acres—four or five acres.

Question 33. How many years did you say you run your sheep on this land?

Answer. Well, between three and five years. I have been running them across on my land, and run them over there.

Question 34. How many sheep did you have?

Answer. I had from four hundred—when I got through with them I had over a thousand head. I took them on shares, most of them; I had only a few of my own.

Question 35. You raised them on this land and on other land like it in the neighborhood?

Answer. I run them across it. I kept them on this more on account of the water; there was good water there.

Pages 16 and 17:

Question 58. How many years have you known Mr. William Ryder Powell on this land?

Answer. About 1866; I knew him before that.

Question 59. I mean on this land?

Answer. 1866 he came there, to the best of my knowledge.

Question 60. What does his family consist of?

Answer. He hasn't got no family here. He makes it his home there. I don't know whether he has got any family there; that is, none that I know of. That is, I never saw no family.

Question 61. How does he make his living?

(OBJ.—Objected to as irrelevant.)

Answer. I could not say how he does. He is shearing sheep sometimes, and works sometimes for farmers at harvest. I have saw him doing both. He has sheared for me, and for others.

Question 62. Where has Mr. William Ryder Powell kept his sheep.

(OBJ.—Objected to as irrelevant.)

Answer. I don't think he has any sheep. He sheared for me and he sheared for the neighbors there.

Question 63. What use has he made of this land, if any?

Answer. He hasn't made any use of it, except to let any one run across the place there. He hasn't charged me anything. I couldn't say whether he has charged any one or not. It has been a commons; everybody has had it.

J. H. Welch, examined for complainant, (Record, pp. 35, 36.)

Question 66. Who occupies the northeast quarter?

Answer. Dr. Powell, I believe. He lives there.

Question 67. Since when did Dr. Powell occupy the land?

Answer. The first I knew of it was in 1866.

Question 69. What improvements, if any, has he now, at the present time, on the land?

(OBJ.—The same objection.)

Answer. Well, he has got a house and a barn, and a small piece fenced in with a brush fence, besides the mining improvements he has made.

Question 75. You state that Dr. Powell has occupied the

land since 1866. Do you know what work he did upon that land during the years 1866 and 1867?

Answer. I don't think he done any mining.

Question 76. The same question as to 1868 or 1869?

Answer. Well, I don't know of any. In '68 and '69 I was not there.

Question 77. Do you know of his doing any mining at all upon the land?

Answer. Yes; since 1870.

Question 78. What years do you know of his mining the land?

Answer. *I think it was* 1870 *or* '71, the first that I knew anything about it.

Question 79. What did that mining consist of?

Answer. There was some of these holes and cuts that he run; part of them then and part of them since; and some of them has been run farther now than they was then.

Mr. Welch, who is well acquainted with the history of the locality, gives us a bird's-eye view of the entire premises on cross-examination, (p. 44.)

Question 220. I mean to say on all of this quarter section that we are speaking of now, after you dig down a little distance you get clear of the dirt and come to the rock?

Answer. You would in some parts of it. The holes that I dug we didn't get through, so I could not tell. The cut was not through.

Question 221. Did you ever in any place there dig down entirely through the dirt and come to the rock?

A. O, yes, sir.

Question 222. After you dug down and came to the rock, did you find cinnabar in the rock?

Answer. I never dug down but in one place, and there was none there.

Question 223. So that all the cinnabar that you ever found was mixed with the dirt and rock?

Answer Yes, sir.

Question 224. When did you first know this mining district?

Answer. In 1862. I have been in there a few times before, when they were prospecting in it, but I was not much acquainted until 1862.

Question 225. And you have known it ever since?

Answer. Yes, sir.

Question 226. Since 1862, up to this time, have you ever known any individual or any company or companies to be successful in mining there—make any money?

Answer. I don't know whether they did or not. I did not keep their books, and of course I had no means of knowing.

Question 227. You say that Powell has a house and barn on this land?

Answer. Yes, sir.

Question 228. What did he have the barn for?

Answer. I don't know. He built it, thinking he would save some hay, I guess; sometimes he does get a ton or two.

Question 229. On the land.

Answer. Yes, sir.

Question 230. Does he do any farming?

Answer. That is all I know. He would sow a little wheat on the place to get hay. When he does it sometimes the squirrels gets it and he don't get any.

Question 231. If it were not for the squirrels then, he would get some.

Answer. Yes, sir; he would get some.

Question 232. You say he has some mining improvements. What do his mining improvements consist of?

Answer. I believe I have described them. They consist of holes, cuts, and tunnel.

John Grummett, on cross-examination, (p. 85:)

Question 57. How did you make Powell's acquaintance?

Answer. He was shearing sheep up in the mountains close by where I live. I got acquainted with him by his being at work there.

Question 67. How long since you were asked to come here and be a witness?

Answer. Well, probably within ten days or two weeks.

Question 68. Powell asked you to come, did he not.

Answer. Yes; he subpœnaed me to come.

Wm. Ryder Powell is a man who does not support a family; has lived on this land part of the time since 1866;

did no prospecting before 1870, and set up no claim to it until 1874.

He was engaged in shearing sheep, raising hay and grain, but did no mining until 1870 or 1871. He built a house and barn for his agricultural needs, and dug holes, and assumed the ownership of a "cut" and tunnel, both now in a dilapidated state. In ten years we have heard of one thimbleful and one ounce of quicksilver having been obtained from the premises.

Powell has not led the mining board at San Francisco, but, when first encountering Bramlet, a couple of years before this trial, (if I can gauge the time,) he was still sheep shearing—the business which received his attention in 1866 and earlier.

The history of Powell shows the fact, that this land is not mineral. He has lived on it ten years. His house and barn are maintained in good condition, but his holes and cut and tunnel are abandoned and deteriorating, and he seems to be as poor or poorer than when he began mining. Perhaps we may say, having found mining unprofitable, he has gone back to sheep-shearing.

I, of course, suppose that when this action began the Attorney General believed that a grievous mistake and wrong had occurred in the issuing of the railroad patent, but the evidence in the case does not show it—does not sustain an affirmative; but, on the contrary, shows *that no mistake was made about this* quarter section. It is not and was not mineral land.

One of the witnesses, Taylor, says this land is about 25 miles from Oakland, say 30 from San Francisco; one or two say that the region has been prospected for cinnabar for 12 to 15 years. Powell, a single man without family, living there 10 years, has tried mining without favorable results. Whether the cinnabar ores found would pay for reduction is a point on which the witnesses thus far agree; they say with appliances in use and heretofore used they will not.

Some think that with improved facilities and machinery they would—others that they would not.

If there is any doubt here, we may turn to the history of quicksilver mining. From the articles, "Mercury," "Almaden," "Idria," in *Ure's Dictionary*, we derive the following:

"The geological position of the mercurial ores, in all parts of the world is in the strata which commence the series of secondary formations."

The mercury is evaporated at a heat of 662 Fahrenheit. The ores are roasted in furnaces, with which are connected a series of cold-air chambers for condensing the mercurial vapors.

The sulphides (cinnabar ores) at Almaden, in Spain, and Idria in Carniola (Idria is 28 miles N. E. of Trieste,) are rich in quality, and "massive" in form. The Almaden mines have been known from 700 years before the Christian era, and have been worked almost continuously. The lode is 14 to 16 yards thick. The mines are over 1,000 feet deep. The ores reduced average 10 per cent.—some contain as high as 70 to 80 per cent. of pure cinnabar.

The ores at Idria are equally rich. This mine has been worked since 1497—over 350 years. Both appear to be inexhaustible.

Watts' Dictionary of Chemistry, p. 883, "Mercury": The most abundant ore is the sulphide, or cinnabar, from which nearly all the mercury of commerce is obtained. Its most important mines are those of Idria, in Illyria; and of Almaden, in Spain. At Almaden it is found in veins, often nearly 50 feet thick, traversing micaceous schists of the older transition period; in Illyria it is disseminated in beds of grit, bituminous schist, or compact limestone of more recent date.

Encyclopedia Britannica, vol. 5, p. 784: Cinnabar is the native sulphide of mercury. * * It generally occurs in

fibrous or amorphous masses, bedded in slate-rock and shales, and more rarely in veins in granitic or porphyritic rocks.

Murray's Hand-Book for Spain, part 1, p. 220; (Almaden): The mine is apparently inexhaustible, becoming richer in proportion as the shafts deepen. The vein of cinnabar, about 25 feet thick, traverses rocks of quartz and slate, and runs towards *Almadenejos*. * * * * * The deepest shaft is said to be 1,000 feet, and the lode improves the deeper it is worked.

Baedeker's Southern Germany and, The Austrian Empire, (1868,) p. 343; Quicksilver mines of Idria: The mines are approached nearly in the center of the ancient town of Idria (1,488 ft.), by a flight of 787 steps hewn in the limestone rock. Drops of the pure metal are everywhere visible, adhering to the ore which is excavated by means of pickaxes. It is brought to the surface from a depth of 2,500 feet. * * * The annual yield averages 125 tons.

The quicksilver mines of California have reached an importance not secondary to those of Europe. The principal mines are those of New Almaden, Gaudalupe, and New Idria, and one in the Napa valley.

Those of New Almaden and Guadalupe are in the same range of mountains, some 15 miles apart only, and are said to be similar in all respects.

The New Idria mines are in a less frequented locality, and I have not met with authentic statements in regard to them.

Harpers' Magazine for June, 1863, contains an article written in 1857, by W. V. Wells in reference to the New Almaden mine, from which the following extracts are made:

* * * * * * *

The main entrance to the mine is a tunnel, commenced in 1850, in the side of the mountain, in a line with the patio, and which has already been carried to the distance of 1800 feet, by 10 wide and 10 feet in height, to the crown of the arch. * * * * *

We followed the glimmering candles, now down a slippery inclined plane, and again struggling up the precipitous base of some vein of cinnabar, which in its erratic course seems to have shot through the solid heart of the mountain, in much the zig-zag course that a drop of quicksilver would describe in rolling about the surface of a plate. * * *

We are now more than 200 feet below the patio and 600 feet below the summit of the mountain. * * *

A little farther, and we find a plank stretched across a narrow chasm, upon which two or three swarthy broad-chested miners are standing, drilling their way into the solid rock above them, where a rich lead has just been found. * * *

The ore is the native red sulphuret of mercury, with a specific gravity varying from 6.7 to 8.2. * * * The ore averages 36 per cent. * * * In the New Almaden mine the ore occurs in amorphous masses, in pockets and irregular veins, sometimes surrounded with a black clay, but often encased in a hard sterile rock or chlorite slate, which it is generally necessary to blast to remove. * * *

About 1,500,000 pounds were exported in 1854.

The ore of the New Almaden, which, as has been observed, is solely sulphuret of mercury, the rarest known, exceeds in richness that of any other on record. Although its average is 36 per cent., specimens have been found with the incredible yield of 72 per cent of mercury. * * *

In 1812, at the works of Idria, 56,686 quintals of ore yielded 4,832 quintals of quicksilver, or about 8½ per cent. * * * The mine is apparently inexhaustible. * * *

The mines in Idria were discovered in 1497, and have been steadily worked from that time.

* * * * * * * *

The Almaden mines in La Mancha set into the Sierra Morena in much the same manner that the New Almaden does into the Santa Cruz range. The first has yielded steadily for over two thousand years without diminution, and there is no likelihood of the latter becoming exhausted.

* * * * * * * *

If I have comprehended the elementary developments of nature that make up the requisites of a true cinnabar mine, yielding valuable commercial results, *rich ores* must

be found *in large masses.* Though inferior ores are reduced at the great mines, it is because they have been necessarily extracted from the mine in order to the removal of the masses of rich and valuable ore—yielding 30 to 70 per cent. of quicksilver.

In twenty years of prospecting, there has been nothing whatever developed upon the NE. ¼ of sec. 29, Tp. 1 N., R. 1 E., indicating the existence of large masses of rich ore under the surface where the prospect holes have been sunk to the rock, hard shale has been encountered.

The uninformed men of the vicinity of Mt. Diablo, who find employment in sheep raising and wool growing, have not the experimental or theoretical knowledge which would make it plain to them that the notion of obtaining quicksilver from little chunks of cinnabar ore, found by panning the dirt and gravel of the surface earth, is chimerical. The cost of the panning process is too great for the value of its results, and if the ore that is found on the NE. ¼ of Sec. 29, were delivered at a furnace, it would, as to quality, scarcely pay the cost to accrue from reduction; and, as to quantity, would yield but a few flasks annually. Both in quality and quantity of ore, the yield could never justify the labor of obtaining mercury from panning dirt upon this land, or breaking up and reducing the few boulders found in the gulches.

I have seen lately in the newspapers, a statement that the yield of the California mines to date has been over 100,000,000 pounds of quicksilver since 1846, of which 67,000,000 have been exported.

Comparing the results obtained from known mines in California, with the results of twenty years prospecting upon the NE. ¼ of Sec. 29, Tp. 1 N., R. 1 E., we see distinctly that this quarter section is utterly worthless for cinnabar ores.

FURTHER REMARKS UNDER THE SECOND PROPOSITION,

Showing that the Tract in Controversy was never Returned by the U. S. Surveyor as Mineral Land.

The plat of the survey of this quarter section was returned by the United States Surveyor General to the office of the register of the land office at San Francisco, in whose district the land lies, on the 19th of July, 1867, as is stated by Duncan McNee, a witness for complainant, and a clerk in the United States register's office. He says, also, that the office continued to act upon that map until October 17, 1873. His evidence is so important, I quote as follows: p 176.

DUNCAN MCNEE, recalled for complainant by consent.

Mr. HEATH:

Question 1. Look at the traced map now produced, and state what it is.

Answer. It is a map of part of township 1 north, 1 east.

(The map above referred to is offered in evidence by complainant's counsel, marked Complainant's Exhibit.)

Cross-examination by Mr. WISE:

Question 1. When was the first map of the northeast quarter of section 29, township 1 north, range 1 east, first filed in the United States land office, in this city?

Answer. On the 19th day of July, 1867.

Question 2. How long did the office continue to act upon that map?

Answer. Until October 17, 1873.

Question 3. Who sent the map to the land office?

Answer. The United States surveyor general for California.

Question 4. That was the regular way of transacting business?

Answer. Of course.

Question 5. Did not the department at one time notify you that a patent had been issued before the land had been surveyed?

(OBJ.—Objected to as secondary evidence.)

Answer. I believe so.

Question 6. And did you reply to that?

(OBJ.—The same objection.)

Answer. My recollection is we did.

Question 7. Have you got those letters here?

Answer. Yes, sir; on the 14th of March, 1874—letter "N"—the Commissioner of the General Land Office decided that the northeast quarter of section 29, 1 north, 1 east, was erroneously patented to the Western Pacific Railroad Company on the 31st of May, 1870. At that time the land in question had not been surveyed; that is what they say.

Question 8. Was that a fact, that it had not been surveyed?

Answer. It was not a fact.

Question 9. What did you inform the department in answer to that?

Answer. On the 30th of March, 1874, the register and receiver replied to that letter. Their letter commenced with the usual heading—"United States Land Office, San Francisco, March 30, 1874," and was as follows:

"Hon. WILLIS DRUM'OND,
Com'r Gen'l Land Office.

"SIR: Referring to your letter 'N' of the 14th in relation to the claim of Wm. Rider Powell to the NE. ¼ of sec. 29, T. 1 N., R. 1 E., we have now to report that we have this day called upon Charles McLaughlin, Esq., land agent W. P. R. R. Co., to surrender the title to said land to the United States.

"In this connection I would state that said land was returned as surveyed by the plat filed in this office July 19th, 1867, but was not returned as mineral land until Oct. 17th, 1873.

"Very respectfully, your ob'd't serv't,
"H. J. ROLLINS, *Register.*
"CHA'S H. CHAMBERLIN,
"*Receiver.*"

Redirect examination by Mr. HEATH:

Question 1. Have the field-notes for the map of July 19, 1867, been filed in this office?

Answer. I could not say.

Question 2. Will you look at the original map of the

section in question, filed July 19, 1867, and examine the entries made upon the north half of the northeast quarter, and state what writing you see upon that map?

Answer. I see on the north half of the northwest quarter the figures "80," and on the northeast quarter the figures "160," referring to the area of the same, eighty acres and one hundred and sixty acres.

Question 3. What writing do you see upon it?

Answer. There is no writing at all on those quarters.

Question 4. On the northeast quarter of section 30 what writing do you find?

Answer. On the north half of the northeast quarter of 30 occurs the word "cinnabar," or, to put it plainer, indications of cinnabar extend east and west along the north half of the northeast quarter of 30.

Question 5. What writing is there upon sections 30, 29, 31, and 32, with reference to the character of the land?

Answer. Steep mountains, unfit for cultivation; indications of cinnabar.

This evidence is given with the office-plat before the witnesses and the examiner. In the absence of a copy of the plat of the township, this testimony agrees with the fact that the patent issued for this northeast quarter, by a proper description, after the selection thereof had been duly examined in the register's office at San Francisco, and in the General Land Office.

Mark, also, that the witness says—and this is the complainant's evidence—that the traced map marked complainant's exhibit "is a map of part of township 1 north, range 1 east." *It is that, and nothing more.* This attempt to make anything else of it, to exhibit it as *the Government survey* of the land in controversy, is a total failure, as I shall demonstrate.

That diagram is made up from the original survey of 1867, as to the north half of the northwest quarter and the northeast quarter of section twenty-nine, a survey authorized by the act of Congress of March 3d, 1853, restricting surveys of public lands to those not mineral, and as to the balance of

section twenty-nine, and all of sections thirty, thirty-one, and thirty-two, it is made up from the field notes of the survey made by Partridge, in 1873, *after* the law forbidding the sub-division of the mineral lands had been repealed.

The legal result of both plats is that the northeast quarter of section twenty-nine was surveyed and returned as non-mineral land in 1867, and the southeast quarter was surveyed and returned as mineral land in 1873. The official boundary between the two descriptions of land is fixed on the line between the two quarter sections—leaving the northeast quarter unstained by any official return as mineral land.

Another Government witness besides McNee sustains my argument on this point. G. H. Welch, (at p. 39, margin 153), helped make a survey made by a surveyor, Thompson, in 1871, and says, "we had the lines run on one side of it, and they were before run on the other side. The north part of it was already surveyed."

The position I thus take is not in accordance with the certificate of H. G. Rollins, register at San Francisco, attached apparently to the diagram, but I am sustained by the field notes, and by the United States Surveyor General.

Mr. Rollins has certified that this diagram, or map, of a part of the township, as McNee properly calls it, is a "*correct copy of the original plat of township one north, range one east.*" We know that it is nothing of the kind by looking at it. Then we know that the register has no legal custody of *original plats*, and no legal authority to certify copies of them. This authority is by law given to the Surveyor General—and to him alone.

In support of this statement, I refer to sections 1, 2, and 3 of the act of March 3d, 1853, (10 Stat., 244.) Said section 3 carrying us back to the acts of 3d March, 1831, 4 Stat., 492; and section 10, act March 3d, 1803, 2 Stat., 233; and section 2, act May, 1796, 1 Stat., 464. These laws require the original plats of surveys to be kept in

books at the Surveyor General's Office; a copy to be kept open in that office for public inspection; another to be sent to the General Land Office; and a third to the local register's office. (Act 1796.)

These acts of Congress define the original plats of township surveys as those filed in the Surveyor General's Office, and he is the officer and the only officer invested by law with authority to certify to copies of the plats.

The Government offered in evidence "the field notes of "the sub-division lines of township one north, range one "east," "by John C. Partridge, commenced January 14, "completed January 15, 1873." (Record, p. 180, margin 757; found in detail, Record 187, 188, 189.

The Surveyor General, November 9, 1875, (p. 189), certifies to the copy from the approved "original field notes, as "the same remain of record and on file in this office."

The surveyor in his general description says: "The *portion of this township which I have sub-divided* is very rough and broken, and mountainous, and is more valuable for mining purposes than any other, particularly sections 29, 30 and 31," etc.

The surveyor speaks of the portion of the township he has subdivided in section 29, sections 30 and 31. His statement does not relate to any part of a section that he did not subdivide.

Now, what he had subdivided might have been less than all of each section named. *It was less than all of section* 29. The survey was one authorized by the act of July 9, 1870, and was intended to complete the survey of the township by extending the lines over the lands in the sections named that had not been surveyed in 1867, because then noted by the surveyor as "steep mountains, unfit for cultivation."

This is the truth—hard to find from these papers, yet disclosed by them on a critical examination—viz: the northeast quarter of section 29 was surveyed in 1867 and returned

as agricultural land; the southeast quarter was surveyed in 1873 and returned as mineral land.

Look at the field-notes of Partridge, and we see he did not survey a line or place a monument beyond what was needful to survey the southeast quarter of the section.

He began his survey (p. 187, margin 789) at the northwest corner of section 29, viz., "corner to sections 19, 20, 29, and 30, *already established*," thence south to the southwest corner of 29, viz., "corner to 29, 30, 31, and 32," (margin 790,) running thence east on a random line between 29 and 32, and at 80.30 he met north and south line at a point 21 links north of corner to sections 28, 29, 32, and 33." Evidently that corner had also been "heretofore established;" and from it he went north 89.51 west on a true line, and at "40.15 set stone in mound for quarter-section corner." This is the south line of section 29, and along it he reports "lands abrupt, east slope; soil third rate; no timber, (margin 791.) He continued his survey west, between sections 30 and 31, to the Mount Diablo meridian, which he found at 84.46 chains, where he set a post for corner to sections 30 and 31, (margin 792.) On the next day he surveyed the line between sections 31 and 32, (margin 792 and 793,) and when he reached the corner on the base line to sections 31 and 32, he ran north 81.10 chains to corner of sections 29, 30, 31, and 32. From the corner to sections 32 and 33, in the base line, which of course had been "established heretofore," he surveyed part of the line between sections 32 and 33; at 40.53, north of the base line, he found "the quarter section corner, between sections 32 and 33, already established," (margin 793.)

Examining critically this return of his work, we find he surveyed the line between sections 29 and 30 one mile; that between sections 29 and 32 one mile; that between sections 30 and 31 one mile; that between 31 and 32 one mile; and on the east line of section 32, from the base line, one mile.

In this survey he was along only the southern and western lines of section 29—he was not on either the north or east line of that section—and he did not survey any line or mark any corner of the NE. ¼ sec. 29. His work was merely *supplementary to prior surveys.* His "general description" cannot be regarded as official beyond the survey he made, and his return does not in any manner embrace the NE. ¼ of sec. 29, or impeach the first and legal survey thereof in 1867.

The field notes of Partridge, certified from the Surveyor General's Office, contradict the certificate of Register Rollins in this, also, that his certificate covers six sections—19, 20, 29, 30, 31, and 32—when the field notes show that Partridge surveyed only *three* sections—30, 31, and 32—and a part of a fourth, the S. ½ of sec. 29.

On the diagram (Record, 192) exhibited by the evidence of McNee there is not any mine or mineral indications noted upon the NE. ¼ of sec. 29, although the "Welch mine" is located on the SE. ¼, and with this we see that the statements of witnesses coincide.

I take the liberty to say that the course of the executive officers in regard to this quarter section is difficult to understand. Certainly nothing short of the gross incompetency in some clerk can account for the statements in complainant's Exhibit D, p. 191, margin 797, dated General Land Office, March 14, 1874, particularly the statement that the NE. ¼ of Sec. 29, 1 N., 1 E., had been patented on 31st of May, 1870, but at that time the land in question had not been surveyed.

The register and receiver had certified (Record, 178) that the said lands "are *surveyed* public lands of the United States," prior to the patent, and it is by the surveyed description there given that the patent issued in May, 1870.

The evidence of McNee and Carter, (Record 113 and 114,) was given in the absence of McLaughlin's counsel, and is very inexact and not entirely accordant with the official re-

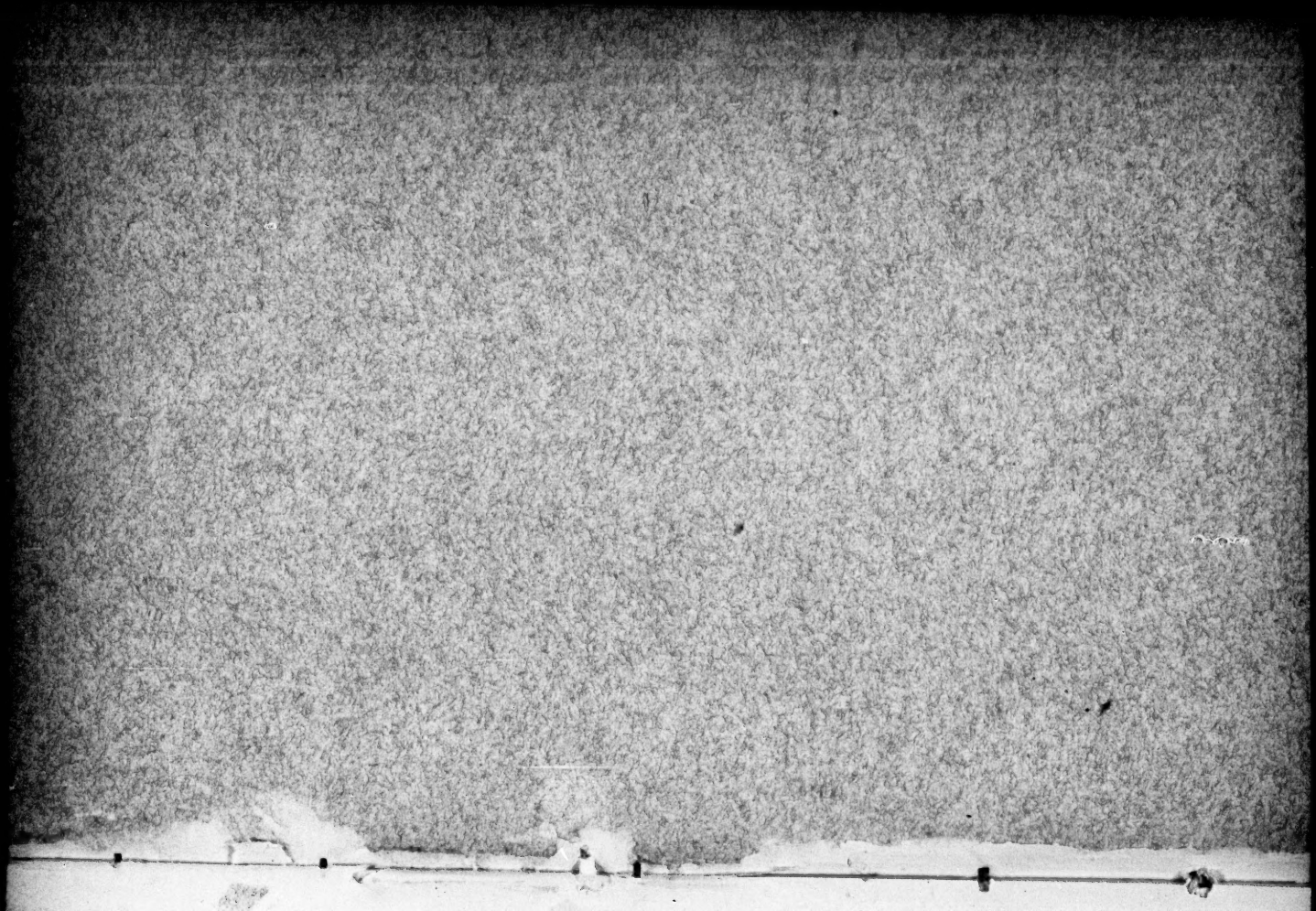
turns, and the subsequent statement of McNee when afterwards recalled, (p. 176.) I do not deem it necessary to say more than this, that the official returns themselves supersede the testimony of clerks concerning them.

We place before this Court now confident of its recognition of the justice of our position, the title of McLaughlin, delivered from all the denunciation that has been put upon it in the bill of complaint, and by the executive officers since the patent emanated.

It is a superficial, yet not unimportant remark, that the land laws applicable to the locality of this tract, and the theory of this case alike assume that there must be a line of demarkation between "mineral land" and non-mineral land, and that this line where the two kinds of land adjoin, *must be placed somewhere.*

As the field notes of Partridge return the S. ½ of sec. 29, as mineral land, we see that in *this particular case*, the executive officers of the United States, in the matter and duty of surveying public lands according to law, and the further matter and duty of patenting land under grants from Congress, have located this line of demarkation on the southern boundary of the tract in contest—north of that line is non-mineral—south of it is mineral land by the Government surveys.

Henry Beard



OFFICE SUPREME COURT U.S.
FILED
MAR 29
JAMES H. McKENNEY, Clerk.

17 Otto 726

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 219.

THE WESTERN PACIFIC RAILROAD COMPANY AND CHARLES McLAUGHLIN, APPELLANTS,

vs.

THE UNITED STATES.

BRIEF FOR THE UNITED STATES.

The object of the bill in this cause is to dissipate the cloud on the title of the tract of land in the bill mentioned, resulting from the colorable right created by the improvident issuing of a patent for the said land by the United States to the Western Pacific Railroad Company.

Under the acts of Congress of 1st July, 1862, (12 Stats., p. 492, § 3,) 2d July, 1864, (13 Stats., p. 356, § 4,) and 3d March, 1865, (13 Stats., p. 504, § 2,) the Western Pacific Railroad Company, as assignee of the Central Pacific Railroad Company of California, became entitled, on the performance of certain conditions, to grants of large portions of the public lands, and actually received the same.

Among the patents issued to the company was one for the land described in the bill, dated the 31st May, 1870.

The object of this suit is to have the said patent decreed to be null and void on the ground that the land covered by it is mineral land, it being expressly provided by the land grant act of the 1st of July, 1862, (*ubi supra*) "that *all mineral lands shall be excepted from the operation of this act.*"

The case is not embarrassed by the defence of purchaser *bona fide*, for, albeit the Western Pacific Company is no longer seised of the land, and the colorable title of the company, under the patent, has devolved upon the appellant McLaughlin, no person can possibly derive title under a patent issued in the teeth of a statutory prohibition. The claim under the patent in question can no more rise higher than the void patent than a stream can rise higher than its source. The peril of the existenee of the fact that the land is non-mineral is with the patentee and all who deraign title under him.

The simple question in the case, then, is whether the land covered by the patent is *mineral land or not*, for if it is, the patent is *necessarily void.*

To show that the *locus in quo* is mineral land, the Government introduced some seventeen witnesses whose testimony establishes to a moral certainty that the land in question is valuable only for its deposits of cinnabar or quicksilver and worthless for agricultural purposes.

To meet the case of the Government a good deal of testimony is introduced for the purpose of showing that the land in question, although mineral in character, cannot be worked with profit; and, hence, by a curious deduction finding no support in the statute, is not mineral land.

If the course of argument founded on this testimony is sound, then the prohibition of the statute must be held not

to be operative in cases where land covered by a pretended patent is rich in minerals, which, however, from one physical cause or another, cannot be made available; in short, nothing less than the interpolation of a qualification of the statutory prohibition is attempted.

All that is required to establish the invalidity of the patent is to show that the land is mineral, which we have done.

But the defence also introduce testimony to show that the land in question is not mineral land at all.

This evidence is plainly unreliable on the ground of prejudice, or imperfect observation, or predetermined purpose to support the case of the defence regardless of the facts.

The witness, Jacob Bendixen, admits his hostility to Dr. Powell, the occupier of the land, and applicant for a patent. (R., p. 138, Question 370.)

The witness, William Mulligan, whose mineralogical ability is relied on, when asked what his business is, replies: "I follow all kinds; first one thing and then another." (R., p. 140.) After saying, in answer to the 10th interrogatory, that he never saw any "sign of mineral" on the land, adds, "at the same time, *there might have been mineral there. I have been over the surface.*"

But the witness, who is introduced with the most flourish by the defence, is one J. W. Strickler, a conceited pragmatical man, who had been in the service of the Western Pacific Company, (R., p. 164,) and who was then in the employment of the defendant, McLaughlin. (R., pp. 170–1.) Admitting his connection with a claimant of the land who claimed that it was *non-mineral in production*, he says he ex-

amined it with a view of determining for himself as a miner. (R., p. 158.)

The evasiveness and disingenuousness with which he admits his connection with the defendant, McLaughlin, is noticeable, (p. 160; Int. 17.)

But his barefaced attempt to prove that the land in question is fitted for horticultural and agricultural purposes, shows him to be unworthy of credit. (R., p. 161.) Attention is also called to his answer to question 35, as showing his *animus*.

His utter want of knowledge or experience touching quicksilver mining is manifest. (R., p. 164, Int. 68–72, and Int. 79.) His willingness to give a positive opinion without any basis but common report, is another discrediting feature of his deposition. (R., p. 166, Int. 95.)

It is noticeable that, although he says he visited the land in question with Mr. Wren, who had been the manager of the Almaden quicksilver mines for eleven years, Wren is not produced as a witness, nor is the witness Strickler asked as to his whereabouts! If the defence be an honest one, it is unaccountable that Mr. Wren was not examined or his non-production accounted for.

It is amusing to read his answer, in reply to the question whether he was requested to report the land mineral or non-mineral, namely, "Certainly not. * * * My idea was this: *that if I pronounced it mineral land, that he would have no contest with the claimant—no further contest. If I pronounced it non-mineral, he would contest the claimant's claim.*" (R., p. 171, Int. 172.)

Against the cloud of witnesses produced by the Government to show that the land is mineral, we have only four

witnesses on the part of the defence whose testimony is mostly *negative*. These witnesses are ignorant and non-observant, and some of them *hostile*. It is such testimony that is relied on to overbear the evidence of G. W. Strong, the metallurgist and assayer, W. L. Strong, the assayer, of Archibal Stuart, Richard Taylor, and Joshua Marsh, to say nothing of the other witnesses of the complainant.

In the Government map of 10th October, 1873, the land in question is described as mineral, (R., p. 192,) as also in the field notes of the surveyor who made the Government survey of 1873. (R., p. 189.)

It was upon this evidence that the learned circuit judge, who has a large experience in mining controversies, decreed that the patent was null and void.

It is proper to notice the point made by the appellants, that the record does not show that the Attorney General of the United States gave his official sanction to the filing of this bill.

It does not appear by the record that any such sanction has been given; but that it was given, nevertheless, satisfactorily appears by the following letter from the Attorney General at the time the bill was filed:

DEPARTMENT OF JUSTICE,
WASHINGTON, *January* 17, 1877.

JOHN M. COGHLAN, *U. S. Attorney, San Francisco, California.*

SIR: I enclose a copy of a letter of the 16th instant, addressed to me by the Secretary of the Interior, and the enclosures therewith, to wit: a copy of a report to the Secretary by the Commissioner of the General Land Office, and a copy of a letter of March 14, 1874, addressed by the then Commissioner to the register and receiver at San Francisco.

As requested by the Secretary, you will cause legal pro-

ceedings to be instituted to vacate the patent to the Western Pacific Railroad Company of California for the N. E. one-fourth of section 29, T. 1 N., R. 1 E., Mount Diablo meridian.

Very respectfully,
(Signed) ALPHONSO TAFT,
Attorney General.

It is conceived that this is entirely sufficient to ~~justify~~ gratify the requirement of the case of United States *vs.* Throckmorton (98 U. S., p. 70) in this behalf.

It is respectfully submitted that the decree must be affirmed.

WM. A. MAURY,
Assistant Attorney General.